Library of The Theological Seminary

PRINCETON · NEW JERSEY

PRESENTED BY

Dr. Frederick W. Loetscher

DG88
.S68

D. W. Loetscher,
Princeton University,
Princeton,
N. J.

SOHM'S

INSTITUTES OF ROMAN LAW

LEDLIE

London
HENRY FROWDE
OXFORD UNIVERSITY PRESS WAREHOUSE
AMEN CORNER, E.C.

New York
112 FOURTH AVENUE

LIBRARY OF PRINCETON
FEB 25 1952
THEOLOGICAL SEMINARY

THE INSTITUTES OF ROMAN LAW

BY

RUDOLPH SOHM

PROFESSOR IN THE UNIVERSITY OF LEIPZIG

Translated

(*FROM THE FOURTH EDITION OF THE GERMAN*)

BY

JAMES CRAWFORD LEDLIE, B.C.L., M.A.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW
AND OF LINCOLN COLLEGE, OXFORD

WITH AN INTRODUCTORY ESSAY

BY

ERWIN GRUEBER, DR. JUR., M.A.

OF BALLIOL COLLEGE
READER IN ROMAN LAW IN THE UNIVERSITY OF OXFORD

Oxford

AT THE CLARENDON PRESS

1892

Oxford

PRINTED AT THE CLARENDON PRESS

BY HORACE HART PRINTER TO THE UNIVERSITY

TRANSLATOR'S PREFACE

In translating Professor Sohm's Treatise on Roman Law I have been obliged to follow an arrangement, and to avail myself of expressions, to which, in some instances, English readers, not familiar with the terminology and methods of exposition in use among German jurists, will perhaps be inclined to take exception. Such a phrase as 'obligatory right,' or 'petitory action,' or 'heir by necessity,' will strike them as no less strange than the arrangement which treats of the law of procedure under the heading of the law of property. But where the object is to produce a close and faithful translation, the order of the original must, I conceive, be strictly adhered to; and where phrases such as 'Forderungsrecht,' 'petitorische Klage,' 'Noterbe,' occur, for which we have no equivalent at all, or, at any rate, no recognised rendering, translations must be found which, if they are to be accurate, must of necessity be more or less unfamiliar. And this unfamiliarity will not be without its advantages if it saves the student from erroneously importing into a German treatise the ideas associated with some of the commoner terms of English jurisprudence.

I have to express my thanks to Sir William Markby and Mr. E. A. Whittuck for many useful suggestions made during the progress of the translation.

J. C. L.

CONTENTS

PAGE

List of Abbreviations and Errata xii
Introductory Essay xiii

INTRODUCTION.

CHAPTER I.

The Nature of the Subject.

§ 1. The Reception of Roman Law in Germany 1
§ 2. Roman Private Law 3
§ 3. The Law of the Pandects 4
§ 4. The History of Roman Law 6
§ 5. The Institutes 6

CHAPTER II.

Sources and Fundamental Conceptions.

§ 6. The Sources of Roman Law 8
Appendix. The Manuscripts of the Corpus Juris . . . 11
§ 7. Fundamental Conceptions 14
§ 8. Jurisprudence 18

PART I.

THE DEVELOPMENT OF ROMAN LAW IN ITS PRINCIPAL STAGES.

§ 9. Introduction 23

CHAPTER I.

Roman Law as the Law of the City of Rome.

§ 10. The Twelve Tables 24
§ 11. The Interpretatio 27
§ 12. The Beginnings of the Jus Gentium 38

CHAPTER II.

Roman Law as the Law of the World (The Empire).

PAGE
§ 13. Jus Civile and Jus Gentium 44
§ 14. The Praetorian Edict 48
§ 15. Roman Jurisprudence 59
§ 16. The Imperial Legislation 76
§ 17. Codification 82
§ 18. The Result 91

PART II.

THEORETICAL PART.

§ 19. The System of Private Law 98

BOOK I.

THE LAW OF PERSONS.

§ 20. The Conception of 'Person' and the Kinds thereof 101
§ 21. Slavery 108
§ 22. Cives and Peregrini 116
§ 23. Paterfamilias and Filiusfamilias 120
§ 24. Capitis Deminutio 122
§ 25. Existimationis Minutio 126

BOOK II.

THE LAW OF PROPERTY.

CHAPTER I.

General Part.

§ 26. Introduction 131

I. JURISTIC ACTS.

§ 27. The Conception of a Juristic Act and the Kinds thereof . . . 131
§ 28. Requisites of a Juristic Act 133
§ 29. Motive, as affecting Juristic Acts 135
§ 30. The Qualifications of a Juristic Act 139
§ 31. Capacity of Action 140
§ 32. Representation 144

II. THE PROTECTION OF RIGHTS (LAW OF PROCEDURE).

§ 33. Introduction 147
§ 34. Roman Civil Procedure 148
§ 35. The Legis Actio 152

PAGE
§ 36. The Formulary Procedure 163
§ 37. The Formula 174
§ 38. Intentio and Actio 179
§ 39. The System of Actions 185
§ 40. Condemnatio and Exceptio 189
§ 41. Actio Perpetua and Actio Temporalis. Tempus Utile . . . 206
§ 42. The Effect of an Action at Law 208
§ 43. The Procedure Extra Ordinem. Interdicta. In Integrum Restitutio . 212
§ 44. The Procedure of the Later Empire 220

CHAPTER II.

The Law of Things.

§ 45. The Conception of a Thing 225
§ 46. The Different Kinds of Things 225
§ 47. Real Rights 230

I. OWNERSHIP.

§ 48. The Conception of Ownership 231
§ 49. The Acquisition of Ownership. Historical Introduction . . . 231
§ 50. The Acquisition of Ownership. Derivative Acquisition . . . 234
§ 51. The Acquisition of Ownership. Original Acquisition 237
Note. The Different Unions of Things 247
§ 52. The Protection of Ownership 248
§ 53. The Protection of Usucapio Possession 249
§ 54. The Protection of Juristic Possession. Possession and Ownership . 252

II. JURA IN RE ALIENA.

§ 55. Jura in Re Aliena in general 257
§ 56. Servitudes 258
§ 57. Emphyteusis 268
§ 58. Superficies 270
§ 59. Pledge 272

CHAPTER III.

The Law of Obligations.

I. THE CONCEPTION AND CONTENTS OF AN OBLIGATION.

§ 60. The Conception of an Obligation (Obligatory Right) 278
§ 61. Plurality of Debtors and Creditors 279
§ 62. The Contents of an Obligation 285
§ 63. Negotia Stricti Juris and Negotia Bonae Fidei 286

II. THE MODES IN WHICH OBLIGATIONS ARISE.

§ 64. Contracts and Delicts 287

A. Contractual Obligations.

PAGE
§ 65. Introduction 288
§ 66. Real Contracts 291
§ 67. The Verbal Contract 296
§ 68. The Literal Contract 305
§ 69. Consensual Contracts 309
§ 70. Quasi-Contracts 315
§ 71. Pacts 321

B. Delictual Obligations.

§ 72. The Private Delicts of Roman Law 323
§ 73. Quasi-Delicts 330

III. TRANSFER AND EXTINCTION OF OBLIGATIONS.

§ 74. Transfer of Obligations 332
§ 75. Liability for Debts contracted by Another 335
§ 76. Extinction of Obligations 340

BOOK III.

THE LAW OF FAMILY AND THE LAW OF INHERITANCE.

CHAPTER I.

THE LAW OF FAMILY.

§ 77. Introduction 355
§ 78. The Family 356

I. THE LAW OF MARRIAGE.

§ 79. Marriage and the Modes of contracting it 359
§ 80. Marital Power 365
§ 81. The Proprietary Relations between Husband and Wife . . . 369
§ 82. Dos 372
§ 83. Donatio propter Nuptias 380
§ 84. The Termination of Marriage 381
§ 85. Second Marriages 384
§ 86. Celibacy and Childlessness 384

II. PATRIA POTESTAS.

§ 87. The Modes in which Patria Potestas originates 385
§ 88. The Effect of Patria Potestas 389
§ 89. The Extinction of Patria Potestas 393

III. GUARDIANSHIP.

§ 90. The Different Kinds of Guardianship 395
§ 91. The Appointment of Guardians 399

PAGE
§ 92. The Effect of Guardianship 403
§ 93. Termination of Guardianship 406
§ 94. The State as Guardian-in-Chief 407

CHAPTER II.

The Law of Inheritance.

§ 95. Hereditary Succession; its Foundation and Conception . . . 408
§ 96. Delatio and Acquisitio of the Hereditas 413
§ 97. Hereditas and Bonorum Possessio 423
§ 98. Intestate Succession 437
§ 99. Testamentary Succession 448
§ 100. Succession by Necessity 460
§ 101. The Effect of the Vesting of the Inheritance 469
§ 102. Bequests 473
§ 103. Restrictions on Bequests 479
§ 104. Universal Fideicommissa 481
§ 105. Mortis causa capio 485

Index 487

EXPLANATION OF SOME ABBREVIATIONS

IN THE REFERENCES TO THE GERMAN AUTHORITIES.

Abt. = Abteilung.
R. = Recht.
G. = Geschichte.
RG. = Rechtsgeschichte.
RW. = Rechtswissenschaft.
ZS. = Zeitschrift.
Sav. St. = Savigny Stiftung.

ERRATA

Page 36, note 11, *for* delictu *read* delicto.
„ 50, „ 3, *for* § 48 *read* § 43.
„ 55, „ 11, *for* Tribonianum *read* Trebellianum.
„ 130, line 6, *for* TMPORE *read* TEMPORE.
„ 136, „ 9, *for* esti *read* etsi.
„ 146, „ 23, *before* which *insert* under.
„ 156, note 5, *for* Conditionen *read* Condictionen.
„ 329, line 25, *for* dolore *read* dolove.
„ 435, „ 23, *dele* on.
„ 476, „ 22, *for* verbi *read* verbis.

INTRODUCTORY ESSAY.

THE STUDY OF ROMAN LAW ON THE CONTINENT AND IN ENGLAND[1].

Roman law, it is well known, has been handed down to posterity in the form given to it by the Emperor Justinian in the codification which is familiar to us under the name of the Corpus juris civilis. Accordingly it was the text of this codification which became the object of the exegesis of the jurists when the study of Roman law was revived in Italy at the beginning of the twelfth century.

In order, however, to understand the work done by the Italian scholars, we must bear in mind the firm belief in authority which is so peculiar to the Middle Ages, and so unlike the critical spirit of modern times. It was under the influence of this belief that the jurists of the Middle Ages

[1] For the subject-matter of the present Introduction, see the sections on literature in the *Pandektenlehrbücher* (cf. p. xxvii. n. 1 below) of Arndts, §§ 16–20; Baron, § 3; Brinz, §§ 7–16; Puchta, § 9a; Vangerow, §§ 8–10; Vering, §§ 31, 33; Windscheid, §§ 7–12; more particularly of Bekker, §§ 10–16, and Dernburg, §§ 16–18. Of the various treatises referred to by these writers I am especially indebted to the *Geschichte der deutschen Rechtswissenschaft*, by Prof. R. Stintzing, an admirable work, which, however, owing to the sudden death of the author, has not been completed. Cf. besides J. W. von Planck, *Ueber die historische Methode auf dem Gebiet des deutschen Civilprocessrechts*, 1889. The latter part of this Introduction is chiefly based on the treatises of Prof. Güterbock, *Henricus de Bracton und sein Verhältniss zum römischen Rechte*, 1862 (translated into English by Mr. Brinton Coxe, Philadelphia, 1866); of Mr. Scrutton, on *The Influence of the Roman Law on the Law of England*, 1885; and the famous work of Arthur Duck, *De Usu et Authoritate Juris Civilis Romanorum in dominiis principum Christianorum* (lib. II, cap. 8), 1st ed. London, 1653. See also A. Rivier, *Introduction historique au droit romain*, nouv. éd. 1881, pp. 558–637.

thought themselves absolutely bound by the contents of the Corpus juris civilis. They interpreted and commented on the separate passages of the Corpus juris in just the same way as we should expound a code of law actually in force in our own country, such as the Bills of Exchange Act. They were not conscious of the fact that their own time was separated by a development of more than five hundred years from the period of the codification of Justinian. Thus the complete absence of anything like historical criticism is the first characteristic of their own interpretation.

But the medieval jurists considered themselves bound not only by the substance of the law, but also by the order and arrangement adopted in Justinian's compilation. They were neither desirous nor capable of setting forth the subject-matter of the law in a systematic form of their own independent of that of Justinian. Thus the complete absence of the synthetical element is the other characteristic of their work.

Under these circumstances, historical and synthetical treatment being excluded, the jurists necessarily confined themselves to an analysis of the text. They tried to dissect the contents of the several passages and to develop fully their consequences.

And yet within these narrow bounds the jurists of the twelfth and the first half of the thirteenth centuries, the so-called glossators, performed a very great work. It is by their labours that the contents of the Corpus juris civilis were made accessible and intelligible to the Western world. Their notes or 'glossae,' originally designed to explain an occasional difficulty in word or expression, steadily increase in number, and at last form a full and continuous commentary—which is also called glossa—on all the parts of the Corpus juris civilis, the Digest, Code, Institutes, and Novels.

The number of the commentaries or glossae thus produced by various glossators naturally caused much inconvenience to the student. These commentaries were to a great extent identical; yet in each of them views were everywhere pre-

senting themselves which were peculiar to the individual author.

To meet these difficulties, Accursius, in the middle of the thirteenth century, worked the different commentaries into a single glossa, containing, on the one hand, the views universally admitted, and, on the other hand, embodying the divergent views of the various glossators on questions which had given rise to controversy.

The glossa of Accursius—which is usually referred to in treatises on Roman Law as the Glossa simply—marked at the same time the conclusion of the period of the glossators. With it the productive power of the analytical method is exhausted. The writings of the Italian jurists who followed Accursius, the so-called commentators or post-glossators, or—to use a term familiar to readers of Sir H. Maine[1]—the scholastic jurists, contributed nothing of importance to a real understanding of Roman law. They did, however, gradually develop the simple method of the glossators into a highly complicated and artificial system. A considerable number of dialectical operations had to be performed in order to interpret any passage 'magistraliter[2],' i. e. in accordance with the views traditionally established in the school.

The obvious tendency of this method was to split up legal knowledge into innumerable fragments. And if we take into account the fact that it was usual for a writer, while discussing his own views, to refer continually to the views of other writers on the same subject, and further that each author naturally wished to distinguish himself by raising new questions and distinctions, it will readily be understood that the performance of these numerous dialectical operations came to be his chief object, and that he completely lost sight of the whole basis of his own work, the actual text of the Corpus juris. Instead of the text, what these jurists considered and discussed were

[1] *Ancient Law*, p. 113.

[2] Or *more Italico*, as it was called in the sixteenth century, in opposition to the new method then adopted by the French jurists, the *mos Gallicus*.

opinions on the text; and thus under the influence of belief in authority and the inclination to follow the paths of tradition, the opinions expressed in the glossa and those of the great commentators—particularly those of Bartolus (1314?–1357)—came more and more to be placed on a level with the text itself. It may safely be said that the jurisprudence of the later centuries of the Middle Ages—even down to the sixteenth century—is based, in its essentials, on the glossa and the writings of Bartolus.

Hardly anything is more characteristic of the views of those times than the story told of the commentator Raphael Fulgosius, who flourished in Padua at the turning point of the fourteenth and fifteenth centuries. In his lectures Fulgosius expressly warns his pupils against referring in a court of law to his own interpretation of a passage when differing from that of the glossa. He himself, he says, would much rather appeal to the view expressed in the glossa than to the text itself. For if any person were to refer to the text in a court of justice, an objection would at once be raised to the following effect: 'Do you suppose that the author of the glossa has not seen and understood the text as well as you?'

It is perfectly true that, as far as an understanding of the pure Roman law is concerned, a state of things is to be blamed in which access to the sources of Roman law is no longer even attempted; and so far the period of the commentators has rightly been described as one of decline. Yet, if we consider the development of law in general, the period is not without very considerable merits. In order to appreciate these merits it is necessary to understand the essentially practical tendency of the school. The commentators did not aim at producing a science of law to be taught at the universities, but at producing a law applicable to actual life. What they wanted was to express and to see enforced those rules which were in their opinion required by the actual necessities of the community, in other words, the rules which were in harmony with their modern convictions. But thoroughly believing in the

validity of the written law (the Corpus juris), and deeming its provisions to be the only law actually binding on them, they were instinctively impelled to read their own views into the provisions of the Corpus juris. It is true that this was not unfrequently done by means of a very subtle and even violent interpretation; but it is equally true that this was the only way in which the law of the Corpus juris could have been changed into a law in accordance with the wants of the times.

It was in this shape, the shape given to it by the commentators, that Roman law, on the foundation of the various Universities created on the Continent during the fourteenth and fifteenth centuries, became a branch of academical teaching; and it was consequently in this shape also that it was 'received' in Germany in the fifteenth and sixteenth centuries. If the nation had been conscious of the immense gulf that separated the law of Justinian from their own time, no one would ever have thought of introducing it as the law of the land. And supposing that any such attempt had been made, it would have been met in actual life by a resistance impossible to overcome.

The great intellectual activity that marks the close of the Middle Ages could not fail to exercise its influence on legal studies. The revival of letters in the fifteenth century led to a revival of the study of Roman law in the sixteenth. Roman law came to be looked upon as a portion of classical antiquity, and it was the great aim of the time to understand it as such. In pursuance of this aim scholars directed their attention to a study of the sources themselves, and with the aid of the necessary historical and philological knowledge their critical exegesis of the Roman texts contributed towards an acquaintance with pure Roman law hitherto unthought of. At the same time they extended the materials of the sources, discovering not a few remains of the classical Roman jurisprudence.

Simultaneously with this antiquarian tendency another tendency made its appearance in opposition to the prevalent analytical treatment of the subject. The fact that legal knowledge was split up into an enormous mass of detail was making itself

most seriously felt. These details, devoid of all logical interconnection, could only be mastered by being committed to memory, an object which could only be effected by constantly strengthening and training the student's memory and by supplying him with every kind of mnemonic help. In academical instruction too the method had led to a state of things which was simply unbearable. Owing to the immense diffuseness of legal learning it was but a small fraction of the whole subject that could be dealt with in lectures—sometimes a professor explained a few passages only during a term—and all the rest was left to private study by the student.

The question how the details could be connected together was thus forced into the foreground. The jurists endeavoured to trace the ideas and principles connecting the single provisions with one another, and to combine them into one rational whole. In other words we have here the beginning of a synthetic jurisprudence. The efforts in this direction were powerfully assisted and stimulated by a strong philosophical movement of the time which is associated with the name of the Frenchman Petrus Ramus (Pierre de la Ramée, 1515–1571), a movement which vehemently combats the very foundation of the existing (Italian) method, viz. the whole Aristotelian dialectic of the Schoolmen, and claims for the human understanding the right of thinking according to its own rules, untrammeled by scholastic restrictions.

The new treatment, with this its double tendency (antiquarian and synthetic), is by no means confined to any particular country: it has its supporters in all countries which participate in the revival of letters; but it has its most distinguished representatives in France, and is for this reason commonly referred to as the 'French School,' as opposed to the earlier and later Italian schools, i.e. those of the glossators and commentators.

In France again the new movement centred in the small University of Bourges. It was here that the new synthetical method was first employed in academical instruction and met

with unrivalled success, and here that it first became firmly established as the 'mos Gallicus' in opposition to the 'mos Italicus,' or method of the commentators, which until then had been exclusively used. It was here in Bourges also that the two greatest jurists of the sixteenth century, Jacobus Cuiacius (1522–90) and Hugo Donellus (1527–91), taught side by side, representing at the same time the two tendencies of the new juristic treatment. Cuiacius, on the one hand, aimed at a thorough understanding of the particular provisions of Roman law regarded as a portion of antiquarian research; and equipped with unusually wide philological and antiquarian learning, he succeeded, by means of a most penetrating and scholarly exegesis of the fragments, in entering into the very spirit of the Roman jurists. Donellus, on the other hand, from the very outset aimed at understanding law as an organic whole, comprehending and regulating human life in its entirety. In other words his aims were essentially synthetical. He endeavoured accordingly to grasp Roman law as a system, the single parts of which are strictly connected with one another. His lifelong efforts in this direction found a worthy conclusion in his famous *Commentarii Juris Civilis*[1], which contain a complete system of Roman private law carefully worked out in its consequences. The arrangement he adopted was intended to be a reproduction of that of Gajus, but there is this difference between the two: whilst the arrangement of Gajus is based on a difference in the law itself—(substantive) private law referring either to persons (jus quod ad personas pertinet) or to things (jus quod ad res pertinet)—the system of Donellus, like that of Blackstone, is based on a difference in the nature of private rights, according as they are rights attaching to persons immediately, or rights of persons with reference to property, or rights of obligation.

The example set by the great French jurists could not fail to exercise a considerable and lasting effect on the study of

[1] See Stintzing, *Geschichte der deutschen Rechtswissenschaft*, vol. i. p. 378 sq.

Roman law in France as well as in other countries. The provisions of Roman law having once been clearly conceived of as forming part of a great systematic and historic whole, the synthetical element gained universal recognition; and by the end of the sixteenth century it was predominant both in literature and in academic teaching. Under the influence of the new method the form of exposition was gradually altered. The style which had naturally been rugged and disconnected under the analytic method of the Italian jurists, became of necessity fluent and connected. Another necessary result of the new method was the division of legal science into several distinct branches, which, under the influence of the Italian school, had only been dealt with incidentally, without being distinguished, in commenting on the various parts of the Corpus juris. Thus, for example, criminal law had been dealt with in comments on the so-called 'libri terribiles' of the Digest, books xlvii and xlviii, the corresponding part of the Code, book ix, and the last title of the Institutes of Justinian; constitutional law chiefly in comments on the titles of the Digest (ii. 1) and Code (iii. 13), dealing with jurisdiction. Thus chiefly—though not exclusively—under the influence of the synthetical efforts, civil procedure, criminal law and procedure, constitutional law, and, lastly, international law were recognised in teaching and literature as special departments of legal knowledge, whilst the study of the Corpus juris itself was more and more confined to an exposition of private law.

Great as these changes were, the success of the so-called French school was by no means unqualified. It had brought about a separation between theory and practice. It is obvious that the exigencies of actual practice could not be satisfied by the results of a school which aimed at an exposition of pure Roman law, i. e. a law which was certainly not the law actually in force.

The Italian literature therefore maintained its authority as before in actual practice; and even the 'mos Italicus' was retained for a considerable time—it is traceable down to the

seventeenth century in the teaching of the subject—for it was the method which aimed directly at preparing the student for his practical career, at making him familiar with the controversies, the 'communis doctorum opinio,' and the details of case law.

It is equally intelligible that in legal literature a reaction should set in against the purely Romanist tendencies of the French school. This reaction was strongly noticeable in France itself as early as the latter part of the sixteenth century[1]. But it also made itself felt in the country which has chiefly contributed to the subsequent development of the theory of Roman law, namely Germany. From the end of the sixteenth century we find the energies of the German jurists more and more concentrated on the study of the legal conditions and institutions of their own surroundings, their native country. And it is no doubt due to the absorbing practical tendencies of the time that the great attempts made by some of the French jurists (especially by Donellus) to set forth a system of their own remained on the whole isolated facts down to the eighteenth century.

Yet the progress in the treatment of the subject, begun in the sixteenth and continued in the seventeenth century, is considerable. The commentaries on the various parts of the Corpus juris, i.e. the Digest, Code, Institutes, and Novels, were replaced by a commentary on the Digest only, or, strictly speaking, by an exposition of the whole subject following the order of the titles in the Digest. Under the heading, *rubrica*, of each title, the topic referred to is explained in the form of a treatise which presents a uniform and connected view of the whole subject—including, therefore, the additions, modifications, and alterations introduced by other parts of the Corpus juris. Thus within the limits of the single title the synthetical element comes fully into operation.

The reform of the study of Roman law thus inaugurated in the sixteenth century had, however, not yet affected the very

[1] It was only in Holland, by the so-called 'Dutch School,' that the antiquarian researches of the French school were successfully carried on during the 17th and part of the 18th centuries.

basis of that study. The fundamental belief of the Middle Ages in the continuity of the Roman Empire, the theory of the 'dominium mundi' of the German Emperor, was still maintained, however much at variance with the actual condition of Europe in general, and of Germany in particular. Roman law was still thought to be a law published by the Emperor, and therefore binding on all the countries of Christendom.

It is to Herman Conring of Norden in East Frisia that we are indebted for the signal service of having definitively destroyed the very foundation of this error. In his famous treatise *De origine juris Germanici*, 1643, he established beyond all doubt the following positions :—

(1) The view that the Corpus juris civilis was ever published in Germany, as a law binding on the country, is a fable entirely without foundation.

(2) On the contrary it was gradually introduced in the fifteenth century, having first been taught at the universities and afterwards applied in the courts of justice.

(3) It is in force only because it has been received by usage, voluntarily; and, consequently, only *to the extent* and *in the form* of such 'usureception'; in other words, only those provisions of the Corpus juris civilis are in force which have been actually received by usage, and these provisions only subject to such modifications as have been imposed upon them in actual use [1].

The sensation created by the publication of the treatise was immense. Notwithstanding all opposition, the result was indisputable: Roman law *as such* was not the law of the country. What then was the law actually in force in Germany? This is the question which was forced upon the attention of jurists of the seventeenth century. With a view to solving the problem thus clearly placed before their eyes the lawyers of this period (and foremost among them Carpzow and Mevius) devoted their energies to a study of the law as applied in actual life, i. e. the decisions of the courts.

[1] See Stintzing, *Geschichte der deutschen Rechtswissenschaft*, vol. ii. p. 18 sq.

In accordance with the realistic tendencies of the time, not uninfluenced by the empiricism of Bacon, they regard the views laid down in the single decisions as empiric facts, so to speak; they collect these views, formulate the legal principles which they contain, and combine them into more comprehensive conceptions; in short, they advance step by step in strict harmony with the inductive method so strongly advocated by Bacon. Thus the foundation is laid for the development of that system of private law which is known to us under the name of 'usus modernus Pandectarum.' But in building up their system the writers could not possibly dispense with the authority of the *written* law, as laid down in the Corpus juris civilis; for it was impracticable to corroborate each proposition which was wanted as a part of the system by reference to an actual decision. They had, therefore, at the outset to assume the validity of the law laid down in the Corpus juris.

This assumption was subject to a double modification: on the one hand, every sentence of the written law (the Corpus juris) which was clearly not used in Germany was excluded, and, on the other hand, every proposition of the unwritten law (outside the Corpus juris) which was actually in use in Germany was included, in their systematic exposition of the law.

The works on the 'usus modernus Pandectarum,' which are the result of these efforts—e. g. that of Georg Adam Struve, published 1692–1701, and that of Samuel Stryk, published 1690–1692—though following the order of the Digest as before mentioned, are yet specially adapted to the peculiar conditions of Germany. They deal with the institutions of Roman and of German origin which make up the private law actually in force in Germany, thus expounding, side by side, Roman law as modified by the customs and statutes of the German Empire, and pure German law.

The science of law in Germany has thus completely changed its character. It has become distinctly national. A *German*

jurisprudence is now established for the first time. Up to this period, i. e. the seventeenth century, it had been universal and foreign in its character; universal, because it was applicable in essentially the same way to every country of Christendom, being based on sources universally recognised; foreign, because it dealt with a foreign law—the law of Rome—in a foreign way, either according to the 'mos Italicus' or the 'mos Gallicus.'

The enormous labour which was devoted to working out the 'usus modernus Pandectarum' gave to the theory of the German Common Law the shape which it retained down to the present century. Yet the result was far from giving thorough satisfaction. It had too clearly revealed the actual condition of the law in Germany. Innumerable provisions of foreign origin, viz. the rules laid down in the Corpus juris civilis, the Corpus juris canonici, and the libri feudorum, claimed to be taken into account in the administration of justice. These provisions, which had come into existence during a period extending over more than two thousand years, were, of course, not in harmony with one another; but still less were they in harmony with the principles underlying the institutions of German origin which had prevailed to a greater or less extent throughout Germany, and which had an equal claim on the attention of the practical lawyer. Moreover the administration of justice gave ground for many complaints: the delay in the decision of cases was endless. Last, but not least, the social and economic condition of the great mass of the population, brought about by the Thirty Years' War and its terrible consequences, was most deplorable and urgently demanded new regulations.

Under these circumstances it is no matter for surprise that, towards the beginning of the eighteenth century, the theories of the Law of Nature, the influence of which had been felt long before in the sphere of public law, began to operate on the study and exposition of private law.

The Law of Nature was to release the nation from all the misery and all the difficulties which embarrassed it. By the aid of natural reason the lost Code of Nature was to be recovered

and a lucid system of clear and simple rules conducive to the happiness of the people was to be developed. But in the endeavour to define the leading principles and classifications of the system, the jurists naturally made the ideas and conceptions of the existing law the basis of their speculation, although they deviated from the positive law in particular points according to their own discretion, sometimes even going so far as to deny the validity of a positive provision, because in their opinion it was contrary to the law of nature or contrary to the spirit of legislation.

These views, so characteristic of the eighteenth century—the views of the so-called Philosophical School or School of the Law of Nature (Naturrechtliche Schule)—and the tendency to legislative activity which they fostered were strongly opposed in the beginning of this century by Friedrich Karl von Savigny[1], who at the same time secured predominance for a school which aimed at an understanding of the positive law and its development, viz. the Historical School.

In opposition to the leading idea of the philosophical school that each epoch can at its discretion determine the conditions of its own existence, Savigny maintains that the present is indissolubly connected with the past: and in opposition to the inference drawn from the above premiss of the philosophical school, viz. that the substance of the law may be evolved by the lawgiver at any moment from his own inner consciousness, Savigny maintains that the contents of the law, so far from being arbitrary, are the necessary result of the whole history of the nation, like the language of a people, which has grown up with the people itself as an integral part of its national character.

Valid as these objections are, and true as it is, that the

[1] Chiefly in his essay *On the Vocation of our Age for Legislation* (1814), in answer to Thibaut's pamphlet *On the Necessity of a Civil Code for Germany* (1814). The literature on the controversy is referred to by Bekker, *Pandektenrecht*, §§ 15, 16, and Windscheid, *Pandekten*, §§ 9, 10. For information on the question itself, see Austin's *Jurisprudence*, Lecture 39, part II. Cf. also the article 'Savigny' by Professor Landsberg in the *Allgemeine deutsche Biographie*, vol. xxx. p. 437 sqq.

views of Savigny have exercised a decisive influence on modern jurisprudence in its historical and systematic tendencies, it cannot be denied that the speculative efforts of the philosophical school in the eighteenth century indicate a considerable advance in the study of law. They have led to a development of a system of arrangement which has completely superseded that of the Digest hitherto followed[1]. And this circumstance, coupled with the fact that during the same century it had become usual to sever the exposition of the institutions of German law, under the name of 'Deutsches Privatrecht,' from those of Roman law, has finally determined the form and contents of the German text-books on the 'Pandekten' in our own day ('Pandektenrecht,' or 'Heutiges römisches Privatrecht'). They accordingly contain only an exposition of the *modern* Roman private law, as a rule under the following headings:—

1. A general part explaining the principles common to all the institutions dealt with in the following—the special—parts of the subject.

2. The Law of Things, 'Sachenrecht,' comprehending ownership and rights over the property of others.

3. The Law of Obligations, including Contracts and Delicts.

4. The Law of the Family, regulating the relations of husband and wife, of parent and child, of guardian and ward.

5. The Law of Inheritance, Testamentary and Intestate Succession.

This systematic arrangement[2], ever since it was first intro-

[1] See the classification adopted in the Civil Codes which have been produced under the influence of the philosophical school at the close of the last and the beginning of the present centuries. The Prussian Landrecht (1794) is divided into two parts, roughly corresponding with what we should call Law of Property (in the widest sense of the term), and Law of Persons (the latter including Public Law); the Austrian Civil Code (1811) contains three parts, (1) Law of Persons, (2) Law of Property, and (3) a general part referring to Persons and Property. Cf. also the French Civil Code of 1805.

[2] It is clearly due to a gradual transformation of the arrangement adopted by Gajus (and Justinian) in his *Institutes* (see last note). The Law of Things, Obligations, and Inheritance form together the so-called 'jus quod ad res pertinet,' whilst the family relations are dealt with under the heading of the 'jus quod ad personas pertinet.'

duced in the beginning of the present century[1], has been followed by the great majority of the writers on the 'Pandekten'[2], although its leading notions and classifications have been more and more fully defined. It has also been adopted more or less by the authors of the elementary treatises called *Institutionen des römischen Rechts*[3] (Institutes of Roman Law), which correspond in their contents to the English commentaries on the Institutes (viz. of Gajus and Justinian).

The attractive work, for the English translation of which I have gladly consented to write this Introduction, the *Institutes of Roman Law*, by Professor Rudolph Sohm of Leipzig, deviates however from this arrangement very considerably. Starting from the idea that private law is identical with the law of property, he asserts in the first place that the person is to be taken into account in his capacity of holding property

[1] By A. Heise in his *Grundriss eines Systems des gemeinen Civilrechts*, 1807, improving upon G. Hugo's *Institutionen des heutigen römischen Rechts*, 1789.

[2] It is adopted by Savigny in his *System des heutigen römischen Rechts*, 8 vols. (vols. i. ii. and viii. translated into English), Berlin (1840–1849), see vol. i. p. 330 sqq. and in particular p. 389 sqq. It is equally accepted, though in some cases subject to certain modifications, in the *Pandektenlehrbücher* of Mackeldey in the seventh (1827) and subsequent editions (14th ed. 1862), translated into English by M. Dropsie; of Mühlenbruch (in the 3rd and 4th editions of his *Doctrina Pandectarum*, 1830 and 1838); of I. A. Seuffert (1824, 4th ed. 1860–1872); of Thibaut in the 8th (1834) and 9th editions (1846)—the general part was translated into English by the present Lord Justice Lindley, 1855—; of Puchta (1838, 12th ed. 1877); of Arndts (1852, 14th ed. 1889), translated into Italian by Filippo Serafini (4th ed. 1882); of Windscheid (1862, 6th ed. 1889); of Baron (1872, 7th ed. 1890); of Dernburg (1884, 3rd ed. vol. i. 1892); of Wendt (1888). An arrangement more closely approaching that of the Institutes, but very peculiar in its character, is followed by Brinz (1857–1871, 2nd ed. 1873 sqq. See vol. i. § 17 and § 123). The arrangement of the Institutes in its chief subdivisions is reproduced by Vangerow (1838, 7th ed. 1863–1869). The usual modern arrangement is observed by Vering in his *Geschichte und Pandekten des römischen und heutigen gemeinen Privatrechts* (5th ed. 1887), which differs, however, from the other *Pandektenlehrbücher* in providing the student with a survey of the whole field of modern private law (including the institutions of German origin) in its development down to our own days.

The draft of a Civil Code for the German Empire (*Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich*; Erste Lesung, 1888) puts the Law of Obligations before the 'Sachenrecht;' otherwise it does not differ from the above arrangement.

[3] See the arrangement observed in the text-books of Puchta (9th ed. 1881), Marezoll (11th ed. 1881), von Scheurl (8th ed. 1883), Kuntze (2nd ed. 1878), Salkowski (6th ed. 1892, English translation by Mr. Whitfield, 1885), Hölder (2nd ed. 1883), Baron (1884), von Czyhlarz (1889).

only, in short as a *subject* or bearer of rights of property:—for it is only within the sphere of public law, according to Professor Sohm, that he is the *object* of a right; and secondly, that family law, on principle, has nothing to do with the family relations themselves (the relation of husband and wife, parent and child), but solely with their influence on property.

I venture to submit that these views, and consequently the leading classification based upon them (into 1. Law of Persons; 2. Law of Property; and 3. Law of Family and Inheritance as the law affecting property as a whole), are not in harmony with the views of the Roman jurists. The person of the filius familias is decidedly subject to the power of the pater familias, and this is certainly no subjection of a public character, for with regard to public law the filius familias is absolutely independent of the father (filius familias in publicis causis loco patris familias habetur[1]). The same remark applies to other members of the Roman familia, the wife in manu, and the slave in the potestas of his master. Roman private law therefore refers to persons not only as subjects, but also as the objects of the private rights of other persons.

But though in my opinion Professor Sohm's theoretical deviation from the ordinary lines is thus on principle unsatisfactory, it does not essentially affect the exposition of the subject, for as a matter of fact—for the sake of convenience—the family relations, and consequently the subjection of persons to family rights, are still explained under the heading of family law.

So much for the method and form of exposition of Roman law in general. Turning now to England, we find that here the study of Roman law dates from a much earlier time than in any continental country except Italy, for it commences with the coming and teaching of the famous glossator, Vacarius the Lombard, in the middle of the twelfth century—a man whose

[1] D. 1. 6. 9; D. 4. 8. 6; D. 36. 1. 13. § 5, 14. Cf. Brinz, *Pandekten*, 2nd ed., vol. i. p. 444, and Professor Lotmar in the *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, vol. xxvi. (1884) p. 524 sqq.

name will for ever be associated with this University, for as we are told by one of his contemporaries 'hic in Oxonefordia legem docuit'[1].

The influence exercised by Vacarius was certainly very great. It is probably not too much to say that the earliest expositions we possess of the English common law are the outcome of the study he introduced into this country. The very first treatise on the common law, known under the name of Glanvil and written towards the end of the twelfth century, shows abundant traces of its author's familiarity with the rules of Roman law. The same remark applies in a far greater degree to the famous work of Henricus Bracton, *De legibus et consuetudinibus Angliae*, written in the middle of the thirteenth century. It is a fact not only that the framework of his treatise —the leading notions, classifications, and terminology—is borrowed (to a considerable extent at any rate) from Roman law, but also that a considerable portion of it is simply copied from texts of the Corpus juris itself, or more generally from the summary of the Institutes and the Code which were compiled by the glossator Azo.

From this work of Bracton Roman law naturally passed into the different abridgments and treatises which were composed on the basis of it towards the close of the thirteenth century (Fleta, Thornton, Britton, &c.), and in this way no doubt affected the practice of the following centuries. Again, from the same work of Bracton, Roman law passed, on the revival of legal studies towards the close of the fifteenth century, into the law literature of the sixteenth and seventeenth centuries (Bracton is referred to by FitzHerbert, Sir W. Staunforde and Lord Coke): thence into the celebrated systematic exposition of English law, the so-called *Commentaries* of Blackstone (first published in 1765); and through Blackstone into every modern treatise on the common law of England.

[1] The evidence is collected by Prof. T. E. Holland in his essay on *The University of Oxford in the Twelfth Century*, Oxford Historical Society, *Collectanea*, vol. ii. (1890), pp. 143, 165–170, 175.

So far the influence exercised by Roman law on the present law of England through the medium of Bracton's treatise is perfectly clear. But how is the introduction of Roman law by Bracton to be explained? How is it to be explained—to use Sir H. Maine's words[1]—that an 'English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus juris'[2]? The simple answer to this question is that Bracton was of course the child of his age, and therefore dominated by the medieval belief in authority, and in particular by the belief in the authority of the written law, the Corpus juris. And being thoroughly trained in Roman law, he naturally makes the arrangement of the Institutes the basis of his work, filling it up with statements of Roman law wherever there is no English law to the contrary. But the contents of the Corpus juris civilis itself compel the author to take into account the English common law, for it is customary law, and customary law repeals pre-existing statute law (Dig. I. 3. 32 i. f.—rectissime etiam illud receptum est, ut leges per desuetudinem abrogentur).

[1] *Ancient Law*, p. 82.

[2] The belief that England, in spite of her actual independence and her early claim of forming an 'Imperium' of her own, was part of the great Christian empire of which the Emperor was the temporal head, was more or less prevalent in the Middle Ages, and, on several occasions, found a marked expression in the relations of the Kings of England to the Emperor. (See the evidence collected in Prof. Bryce's *Holy Roman Empire*, chap. xii. n. 7–14, to which numerous other references may be added. 'Brittania provincia est' says e. g. Albericus de Rosate in his Glossarium. Cf. Duck, *De Usu*, etc., cap. ii. 1, and the instructive lecture of Prof. C. W. von Lancizolle, *Die Bedeutung der römisch-deutschen Kaiserwürde nach den Rechtsanschauungen des Mittelalters*, 1856). It is under this belief that Roman law was taught and made use of in actual practice in the 12th and 13th centuries. Vacarius simply quotes dicta of the Emperor Justinian in his constitutiones *de Codice Iustinianeo confirmando* and *de Conceptione Digestorum*, to prove the binding authority of the Roman texts. (See the Proem to his work in Wenck, *Magister Vacarius*, 1820, p. 69.) Bracton presupposes throughout his work the validity of Roman law, the 'lex' or 'leges,' to which he refers in exactly the same way as to the 'consuetudo Anglicana.' To mention only one point: he tacitly recognises the jus praetorium as a source of English law. His work, in comparison with Glanvil and Fleta, shows at the same time that Roman law gradually obtained more and more actual recognition in the courts of justice. See Güterbock, *H. de Bracton*, § 5 and § 8 sqq.—On the relation of the belief in the validity of Roman law to its actual reception, cf. Hölder, *Pandekten*, § 2.

He therefore refers to English law in all cases where to his knowledge it deviates from Roman law: sometimes by slightly modifying the statements of Roman law, sometimes by giving a full and extensive account of the English institutions in the place of the corresponding institutions of the law of Rome. Thus the account of the law of real property, of succession and procedure, in short of the various departments connected with the then highly developed feudal system, presents an essentially national appearance; whilst on the other hand, the account of the law of obligations (contracts and delicts), of the theory of Possession, of the natural modes of acquisition of property (by occupation, accession, specification, &c.), is for the most part taken from the Roman texts[1]. Bracton's exposition of the common law accordingly presents in reality a mixture: it is partly Roman, partly English law. Roman law was thus in perfect good faith made part of the work which forms the very foundation of the common law; and was thence introduced in perfect good faith into the numerous abridgments and treatises published towards the close of the thirteenth century.

In subsequent centuries, however, and in connection with a growing spirit of emancipation from foreign control, especially from the control of the Emperor and the Pope, the validity of Roman law as such was strongly impugned[2]:—the authority even of Bracton's work was denied by some of the judges for no other reason than that he had cited Roman law texts. This opposition, however violent it was, could not do away with the fact that Roman law had already been received to a considerable extent and had thus commenced to exercise an influence which is still visible in the formation of the Common

[1] Thus if Roman law forms a substantial portion of the system expounded by Bracton, the view of some writers (Duck, *De Usu*, lib. ii. cap. 8, part 3, § 9; Reeves, *History*, ii. 89) that Roman law is merely mentioned for illustration and ornament is clearly wrong. Other writers, however (Spence, *Equitable Jurisdiction*, i. pp. 123 sq., 131, 235; Güterbock, *H. de Bracton*, § 5), go too far when they maintain that, generally speaking, every statement of Roman law contained in Bracton had already been incorporated into the common law of the time.

[2] See Spence, *Equitable Jurisdiction*, vol. i. p. 346 sq.

law at the present day. Nevertheless the opposition has seriously affected the subsequent history of Roman law in England; it has prevented the Common law Courts from referring to the provisions of the Corpus juris as statements of authority even in the interpretation of the law of the land; and, secondly, it has also prevented the country from taking share in the great movement which, in connection with the Renaissance, led in the fifteenth and sixteenth centuries to an extensive reception of the law of the Corpus juris civilis in the western parts of Europe, not only on the Continent but even in the sister kingdom of Scotland [1].

The view commonly entertained that Roman law was never received in England, whilst it was received on the Continent and in particular in Germany, is, according to the above statements, clearly wrong. In both countries, England and Germany, Roman law was received, and was received under the same belief in its validity. In Germany, however, the reception has resulted in the express recognition of the binding authority of the Corpus juris itself, in England it has led to an incorporation of a considerable fraction of Roman law into the body of English law. England, therefore, in spite of the reception, enjoys the advantage of an essentially uniform system of legal rules, whilst Germany is still labouring under the antithesis of her own native law and the law of foreign origin. There are only a few courts in England, courts of very limited jurisdiction (e. g. the Admiralty and Ecclesiastical courts), which recognise, to some extent, the provisions of the Corpus juris as binding for their proceedings and decisions, but of course only so far as such provisions have been received by usage and subject to the modifications imposed by such 'usureception.' Or, to use the language of Lord Hale [2], such provisions are binding only so far as they have been 'received by us, which alone gives them their authoritative essence and qualifies their obligation.'

[1] Wendt, *Pandekten*, § 1, i. f.; Duck, *De Usu*, etc., lib. ii. cap. 10.

[2] See pp. 24, 25 of his *History of the Common Law* (6th ed., London, 1820), a work written some thirty years after the publication of H. Conring's treatise *De origine juris Germanici*.

The comparatively limited influence exercised on the growth of English law by the law of Rome has its precise counterpart in the history of the study and literature of the subject in this country. The great movements in the history of civilisation which we associate with the names of scholasticism, revival of letters, realism, law of nature, theory of evolution, and which, according to the above exposition, have had so marked an effect upon the study of Roman law, introducing into it successively some fresh element—a practical, an antiquarian, a national, a philosophical, and finally an historical element—these movements were bound to affect, in essentially the same way, the study of law in England.

To allude merely to the result of the development: it has led in England, as in Germany, to an antithesis between two schools—a philosophical (analytical) and an historical—which are divided on the very same question that has so long divided the German jurists, the question, namely, whether or no codification is desirable as a means of improving the legal condition of the people.

The study of Roman law, however, has not kept pace with legal studies in general. Owing to the constant objections of the common lawyers to the Roman law, its practical importance diminished more and more, and, with its importance, interest in its study and literature disappeared. Under these circumstances English jurists were unable to take a very active part in the great synthetical efforts of modern times[1].

When, therefore, the study of Roman law was revived some forty years ago, after remaining completely at a standstill ever since the middle of the last century, the only mode of treatment which suggested itself was the analytical, that of commenting on the text of the Corpus juris. It is for this reason that our leading text-books on the Institutes of Gajus and Justinian are commentaries on the text. But they are commentaries of a peculiar kind. Their learned authors are fully in touch with

[1] The English literature on Roman law in the seventeenth and eighteenth centuries is referred to by A. Rivier, *Introduction hist. au droit romain*, § 219.

modern historical and systematic research. Not only do they explain, by means of notes and appendices, the historical development of the law, but they also systematise, connect, and disconnect, the contents of the Institutes in accordance with modern systematic views. This may be explained by a few instances. In connection with the well-known Roman division of law into jus quod ad personas, quod ad res, and quod ad actiones pertinet, they discuss the division adopted by modern continental writers already mentioned. In connection with the explanation of servitudes they explain the various other jura in re aliena—emphyteusis, superficies, and pignus—though they are not treated in this connection in the Institutes of Gajus and Justinian.

These additions are of course very valuable. Yet they cannot do away with the disadvantages necessarily attaching to the prevalence of the commenting element in an exposition. The knowledge upon the subject is too much scattered, it is split up into too many particulars. A real mastery of the subject is too difficult to attain.

Under these circumstances Professor Sohm's book, which presents a uniform systematic and historical exposition of the elements of Roman private law, will — it may be hoped — be welcome to the English student. I venture to think that it will be the more appreciated as being written in a very accomplished style, which has been carefully reproduced by the translator; a style which will I think remind the reader of the elegance and beauty of form which characterise the famous essays and lectures of the late Corpus Professor of Jurisprudence—Sir Henry Maine.

Yet I trust the book will not interfere with the present system of instruction, a system which in my opinion has this very great merit—that it is based immediately on the study of the Roman sources, i. e. chiefly on the text of the Institutes of Gajus and Justinian. The beginner is thus made familiar with the text itself of the law instead of a mere abstraction from the text. And the text introduces him to the numerous cases

which form a constant, living, illustration of the abstract rules of law which he finds in the Institutes. The student is, accordingly, at the same time familiarised with, and prepared for, the practical task of his calling: the application, namely, of the law to a particular set of circumstances falling under its provisions.

The work of Professor Sohm will, I am convinced, be read with very great advantage by the student who has become acquainted in the usual way with the text of the Institutes[1]. He will thereby easily acquire a mastery of the detail with which he is familiar, and will soon find himself in possession of a clear survey of the whole subject both in its systematical and historical aspect.

While thus leaving intact the advantages secured by our present system, this book will introduce a new and very fertile element into the legal studies of the English-speaking world.

ERWIN GRUEBER.

[1] Students desirous of preparing for lectures on the subject, will do well to read at first only cursorily the sections on Procedure (§§ 33–44), and to reserve the careful study of these sections for a second reading of the book.

THE INSTITUTES OF ROMAN LAW.

INTRODUCTION.

CHAPTER I.

THE NATURE OF THE SUBJECT.

§ 1. *The Reception of Roman Law in Germany.*

§ 1. THE great movement in the history of European civilization which substituted the revived spirit of antiquity for mediaeval conceptions and ideas, was consummated in Germany during the sixteenth century. The movement had originated in Italy, and the sixteenth century witnessed its triumphant spread over the whole of Western Europe. Its influence made itself felt in every sphere. Gothic architecture made way for the style of the Renaissance, scholasticism was superseded by humanism. Nor did German law escape being swept along by the mighty current of the new movement. For the national law of Germany had no strong central power to shield and develop it, and could thus offer but imperfect resistance to the inroad of the new ideas. What had been gradually preparing during the fifteenth century was accomplished in the course of the sixteenth, and Roman law was definitely 'received' in Germany.

From that time onwards Roman law has been an ingredient in

§ 1. the law prevailing in Germany. And even where (as e. g. within the territorial limits of the Prussian Landrecht) the formal validity of the Corpus juris civilis has been expressly set aside, the force of Roman principles of law has nevertheless remained substantially unimpaired within large departments of German jurisprudence.

Great, however, as was the material success achieved by Roman law, it was even less remarkable than the effect produced on the scientific thought of Germany. Mediaeval law was not to be found in books. It lived entirely in the memories of men. A science of law was, therefore, a thing unknown in Germany. Thus, when Roman jurisprudence, as contained and set forth in the Corpus juris civilis, made its way across the Alps, it found, so to speak, an empty and vacant territory, which it was able to occupy forthwith without the slightest resistance. German jurisprudence, in fact, dates from the sixteenth century, i. e. its existence commences with, and is due to, the reception of Roman law. As the child of Roman jurisprudence it was but natural that, from the very outset, German jurisprudence should bear the impress of its origin. The marvellous sense of form which characterises all antique art manifests itself clearly in the symmetry, perspicuity, and convincing force of the scientific conceptions of ancient jurisprudence. The natural result, therefore, was that, no sooner had Roman law made its first appearance in Germany, than its own inherent virtues ensured it a rapid and easy victory. Roman jurisprudence came, saw, and conquered. From the sixteenth century to the present day, it has guided and determined all juristic thought in Germany. And this is the reason why, in every plan of legal education in Germany, the first place is assigned to the study of Roman law.

Within the whole field of law, ancient jurisprudence has gained its most conspicuous successes in the domain of 'private law,' which means, primarily, the law of proprietary relations, including ownership and obligations. To this day the science of Roman private law stands in the very centre of German jurisprudence. Hence the Institutes are still concerned with private law in order to supply the beginner with a first introduction to the science with which he has to deal.

§ 2. *Roman Private Law.*

§ 2. There are three different branches of legal study concerned with the private law of the Romans. These are (1) the History of Roman Law, (2) the Institutes, (3) the Pandects. In order more fully to understand this threefold division, it will be necessary to glance, for a moment, at the relation between Roman law and the modern law of Germany.

Modern Germany is divided into two great territories according to the form in which its private law presents itself: firstly, the territory of the so-called Law of the Pandects; secondly, the territory of the Codified Private Law.

The territory of the Law of the Pandects, or (as it is also called) the territory of the Common Law, is that portion of Germany in which Roman private law still possesses formal validity and is enforced, to this very day, except where expressly altered by distinct local laws. This territory embraces Holstein with some parts of Schleswig[1], the Hanse towns, Lauenburg, Mecklenburg, part of Hither Pomerania (Neuvorpommern) and Rügen, the greater part of Hanover, Oldenburg (except the principality of Birkenfeld), Brunswick, the Thuringian duchies, Lippe-Detmold, Schaumburg-Lippe, Waldeck, the district of the former Appellate Court of Ehrenbreitstein, Hesse-Nassau, Hesse-Darmstadt (except Rhenish Hesse), Hohenzollern, Würtemberg and Bavaria (except the Palatinate and the Franconian principalities). It constitutes one large and continuous stretch of land, extending from Schleswig-Holstein in the north to Bavaria in the south. In all these countries many laws have been enacted setting aside the rules of Roman private law,

[1] In the greater part of Schleswig, the so-called 'Jütisch Low' of King Valdemar II. of Denmark (A.D. 1240) is still in force in the form of a Low German translation dating from the end of the sixteenth century. Roman law was never 'received' in the territory governed by the Jütisch Low. Apart from isolated institutions to which it applies, it operates, for the rest, merely as a 'ratio scripta,' i.e. so far only as it gives expression to such requirements as spring from equity and the general nature of the circumstances in question. The same applies to Roman law in the Swiss cantons, except where the law has been codified. It was expressly 'received,' in the sense of obtaining formal subsidiary force of law, only in those portions of Switzerland which were formerly under the influence of the jurisdiction exercised by the 'Court of the Imperial Chamber' (Reichskammergericht) which Emperor Maximilian I. established in 1495 A.D.

§ 2. in some parts but sparingly, in others on a larger scale. But the subsidiary force of Roman private law remains unaffected throughout the whole territory, in other words, it still obtains in all cases where not directly overridden by the contrary provisions of local laws.

The territory of the Codified Private Law is that territory where the formal validity of Roman private law has been set aside in favour of exhaustive local codes governing the entire private law of the land. Nevertheless all these codes have, in substance, adopted a large number of the principles of Roman law. This territory comprises those portions of Germany which are governed by the Prussian Landrecht of 1794, the French Civil Code of 1804 (which is in force on the left bank of the Rhine as well as in Baden in the shape of the Baden Landrecht of 1809), and the Royal Saxon Civil Code of 1863. In the western territories of the Austro-Hungarian Empire (on this side of the Leytha) the law of the Pandects prevailed till 1811, in which year it was superseded by the Austrian Civil Code. Almost the entire Eastern half of Germany to the right of the Elbe, and the extreme west, to the left of the Rhine, are governed by civil codes.

We are now in a position to understand the reason why, and the manner in which, we have to deal with the subject-matter of Roman private law.

§ 3. *The Law of the Pandects.*

In speaking of the law of the Pandects as a branch of legal study, we must be understood to refer to Roman law in its modern form only, i. e. the form in which it possesses subsidiary force within the territory of the 'Common Law' or law of the Pandects. For there are considerable differences between this law and the pure private law of Rome as laid down in the Corpus juris civilis,—differences which have been brought about in the course of a long period of development extending over a thousand years, partly by the mediaeval legislation of the Church (i. e. the Canon Law of the Corpus juris canonici), partly by the customary law of Italy and Germany, partly by the legislation of the former and the present German Empire.

The practical importance of this branch of legal study is twofold.

In the first place, as regards the territory of the Common Law, § 3.
the law of the Pandects represents an actually existing, positive law; in other words, the doctrines which it lays down can claim to be judicially applied in all cases where local statutes or customs have not created any rules of law to the contrary.

In the second place, the law of the Pandects has some practical importance even in the countries which possess a civil code. It would be a mistake to suppose that the framers of these codes (the Prussian Landrecht, &c.) were suddenly inspired with some new and original wisdom. The codes were of course constructed on the basis of the law as it previously existed. Inasmuch, then, as prior to these codes (i. e. from the reception of Roman law in the sixteenth century down to the end of the eighteenth century) the law of the Pandects had subsidiary force as law throughout the whole of Germany, these codes must, of course, have been framed more particularly on the basis of the Pandects. The Prussian Landrecht, the Saxon and Austrian civil codes contain a large number of legal rules which are directly borrowed from the law of the Pandects. (The French civil code contains less Roman law than the others.) The study of the Pandect law, then, will supply the necessary clue without which the civil codes just referred to can never be fully and thoroughly understood.

However, the law of the Pandects is not the only law in force in Germany. For, in the first place, in the countries of the Common Law, we find, in addition to the Pandect law, a long series of local statutes and customs. When any conflict arises, in applying the law, between the statutes and customs and the law of the Pandects, the former always prevail. The majority of these local laws and customs originate not in Roman law, but in the indigenous German law which flourished before the reception of Roman law. In the second place, it should be observed that the contents of the modern codes are only partially drawn from the law of the Pandects. Thus, e. g. in the Prussian Landrecht we find not only legal maxims derived from the law of the Pandects, but also numerous other maxims whose origin is due to the indigenous German law of the Prussian provinces.

§ 3. In order, therefore, to understand the positive private law of modern Germany, a second branch of study is required in addition to the law of the Pandects. This is the so-called German Private Law, comprising, in the technical sense of the term, those institutions of the private law of Germany which owe their origin to an indigenous German source.

Thus the study of German private law divides itself into two branches, corresponding to the twofold origin of the private law of modern Germany. In so far as this law originates in Roman law, a connected view of it is given in the books on the Pandect law; in so far as it originates in native German law, it is set forth in the books on German Private Law.

§ 4. *The History of Roman Law.*

We have seen that the study of the law of the Pandects is a branch of the study of the positive private law of Germany, as it exists at the present day. As opposed to this, the History of Roman Law and the Institutes * are exclusively concerned with the history of the private law of Germany, so far, namely, as that law is itself derived from Roman sources. The History of Roman Law deals with the history of Roman private law from the oldest times down to Justinian, the author of the Corpus juris civilis (sixth century A. D.). It shows us how Roman law, growing from small beginnings, took gradual possession of the whole world. It shows us, further, how Roman law, in accomplishing this outward victory, was inwardly transformed into a great cosmopolitan system of law. It shows us, lastly, the causes to which Roman law, and the theory of Roman law, owe their greatness, and thus enables us, at the same time, to understand some of the reasons why Roman law has been received in Germany.

§ 5. *The Institutes.*

In the Institutes we have presented to our view the final results of the history of Roman law, to the extent to which that history

* The term 'Institutes' is used by German writers to express the modern exposition of the elements of Roman Private Law as dealt with in the Institutes of Gaius and Justinian: and therefore as equivalent to what we in England would call 'Lectures or Commentaries on the Institutes.' See the Introduction.

reached its final stage within the limits of the Roman Empire. In other words, the Institutes are concerned with the private law of Rome as it existed at the time of Justinian. § 5.

It was reserved for Justinian to sum up the results of the whole development of Roman law. The code in which he accomplished this task is the Corpus juris civilis. It stands at the goal of the history of Roman law, and at the starting-point of the history of mediaeval law. It forms, in a sense, both the coping-stone of the whole structure of antique law and the foundation-stone of the structure of modern law.

The central position thus occupied by the law of the Corpus juris civilis will explain why, in the course of legal study in Germany, it is the practice to expound it twice and in two different ways. It is dealt with, in the first place, in the Pandects, i. e. in that branch of legal study which is concerned with the law of the Corpus juris civilis in its modern form, as modified by the Canon law, the customary law of Italy and Germany, and the laws of the German Empire (§ 3). In the second place, it is dealt with in the Institutes, i. e. that branch of legal study which is concerned with the law of the Corpus juris civilis as it existed at the time of Justinian, in other words, with the law of the Corpus juris civilis in its unaltered form, or, as it is also called, the pure private law of Rome. The Pandects give us the Roman law of the nineteenth century, the Institutes the Roman law of the sixth century.

But the Institutes have yet another function to perform. In supplying the student with a view of the private law of Rome in its pure and unaltered form, they are designed, at the same time, to serve as an introduction to the study of law in general.

The plan of the following treatise is thus clearly marked out for us. We shall premise a few words on the sources of our knowledge of Roman law, and also on the fundamental conceptions of law. We shall then proceed to expound the subject-matter proper, taking, by way of introduction, a brief history of Roman law, and then passing on to the doctrinal part, or theory of Roman law.

CHAPTER II.

Sources and Fundamental Conceptions.

§ 6. *The Sources of Roman Law.*

§ 6. The sources of Roman law are of two kinds: firstly, the Corpus juris civilis of Justinian; and secondly, the pre-Justinian sources of law.

I. The Corpus juris civilis.

The Corpus juris civilis of Justinian, in its modern form, consists of four parts: the Institutes, Digest, Code, and Novels.

(1) *The Institutes.*

The Institutes (published Nov. 21, 533 A.D.) are a short manual or text-book, the object of which is to give a brief and comprehensive summary of the whole body of law as set forth in the remaining portions of the Corpus juris, and, at the same time, to supply the student with a general introduction to the study of the Corpus juris. It must be observed, however, that this text-book has, in itself, the force of law, the Institutes being published with the same statutory force as the Digest and Code.

The Institutes are divided into four books, each book into titles, each title into paragraphs. The first sentence of each title, preceding § 1, is called 'principium' (pr.). Thus German writers usually quote as follows:

pr. I. (=Institutionum) de donat. (2, 7)*.

Eod. is=eodem titulo; so that § 4 I. eod., closely following another quotation (say pr. I. de donat. 2, 7), would be a shorter

* English writers quote briefly as follows: Inst. ii. 7. pr.

way of writing: § 4 I. de donat. (2, 7), the name and number of the title not being repeated. § 6

h. t. (=hoc titulo) refers to the particular title dealing with the subject-matter in question. Thus, if the subject under discussion were obviously gifts (donationes) pr. I. h. t. would refer to the principium of the title 'de donationibus' (Inst. II. 7). In other words, 'h. t.' refers to the title bearing on the subject-matter under immediate discussion; 'eod.' refers to the title given in the quotation immediately preceding.

(2) *The Digest.*

The Digest or Pandects (published Dec. 16, 533 A.D.) are a collection of excerpts or 'fragments' from the writings of the Roman jurists, arranged by Justinian, and endowed by him with statutory force. The Digest contains fifty books, each book being divided into titles, each title into 'fragments' or 'leges,' each fragment into a principium and numbered paragraphs. Thus German writers usually quote as follows:—

L. (=lex) 2 pr. D (=Digestorum) mandati (17, 1)*.

L. 10 § 1 eod. (eod. here=D. mandati, 17, 1).

L. 18 h. t. (Here h. t. refers to the title 'mandati,' if 'mandatum' or agency is the special subject-matter under discussion). Books 30, 31, and 32 of the Digest all deal with the same subject, viz. legacies, and are not divided into titles. A quotation thus runs:—

L. 1 D. de legatis I (30).

Some modern writers apply the term 'fragmenta' specifically to the excerpts from the writings of the jurists which make up the titles of the Digest, and therefore quote the Digest briefly as follows:—

fr. 2 pr. mandati (17, 1) (the D. being thus omitted).

(3) *The Code.*

The Code (published Nov. 16, 534 A.D.) is a collection, by Justinian, of imperial decrees and laws, promulgated partly by the older emperors, partly by Justinian himself, and published (for the most part) in the shape of excerpts. The whole collection was to

* English writers quote briefly as follows: Dig. 17. 1. 2. pr.

§ 6. be regarded as one uniform code with statutory force. It contains twelve books, each book being divided into titles, each title into leges, each lex into paragraphs as above. A quotation would thus run :—

L. 11 § 1 C. (=Codicis) depositi (4, 34) *.

The term 'constitutio' (c) is sometimes applied specifically to the leges of the Code, so that the above quotation would run : c. 11, § 1 depositi (4, 34), (the C. being omitted).

Though published by Justinian at different times, these three parts of the Corpus juris, viz. the Institutes, Digest, and Code, were intended by him to constitute, in the aggregate, one single code of law with equal statutory force in all its parts. This is the Corpus juris in the form in which it was issued by Justinian. In its modern form, however, the Corpus juris differs from the Corpus juris of Justinian in that it contains a fourth part, viz. the Novels.

(4) *The Novels.*

The Novels are laws enacted by Justinian and some later emperors, subsequently to the completion of the Corpus juris. The great majority of these Novels were issued by Justinian between 535 and 565 A.D. Most of them have been 'received' in Germany. Being later than the Corpus juris, they take precedence, so far as they have been received, over the remaining portions of the Corpus juris. The Novels are quoted by the number, chapter, and paragraph, e. g. Nov. 118, cap. 3, § 1.

Edition of the Corpus juris :

Corpus juris civilis. Editio stereotypa. Institutiones, recensuit P. Krüger. Digesta, rec. Th. Mommsen. Berolini, 1872. Codex Justinianus, rec. P. Krüger. Berol., 1877. Novellae, rec. R. Schöll (not complete), Berol., 1880, 1883, 1886.

II. The Pre-Justinian Sources of Law are as follows :—

(1) The writings of the Roman jurists in their original form.

(2) The decrees and laws of the Roman emperors in their origina form.

(3) The early Roman statutes and other sources of law in their

* English writers quote briefly as follows : Cod. 4. 34. 11. 1.

original form, together with documents and incidental information in non-juristic writers. § 6.

The following editions are the most important:—

(1) Corpus juris Romani antejustiniani consilio professorum Bonnensium. Bonnae, 1835 ff.

(2) Jurisprudentiae antejustinianae quae supersunt, ed. Huschke, ed. 5. Lipsiae, 1886.

(3) Collectio librorum juris antejustiniani in usum scholarum, ediderunt P. Krüger, Th. Mommsen, Guil. Studemund. Tom. I. Gai Institutiones, ed. 2, Berolini, 1884. Tom. II. Ulpiani liber singularis regularum. Pauli libri quinque sententiarum. Fragmenta minora. Berol., 1878.

(4) Corpus legum ab imperatoribus Romanis ante Justinianum latarum, quae extra constitutionum codices supersunt, ed. Hänel. Lips., 1857.

(5) Fontes juris Romani antiqui ed. Bruns., ed. 5. cura Th. Mommseni. Friburgi in Brisgavia, 1887.

APPENDIX.

The Manuscripts of the Corpus Juris.

We are now accustomed to think of the Corpus juris as constituting a single uniform *book*. Such, however, was not originally the case. Justinian (as we have seen, p. 8 ff.) published the Institutes, Digest, and Code separately as three independent *books*, though it was his intention that they should represent a uniform *body of law*. The novels, of course, were separate and later publications. These facts will explain the form in which the MSS. of the Corpus juris have been handed down to us, each one of which contains but *part* of the Corpus juris as we now know it.

1. *The Digest.*

The Digest has been preserved to us in a famous and most excellent MS. which was known, first as the Pisan, and subsequently as the Florentine MS. During the Middle Ages it was treasured in the city of Pisa, till the Florentines, in the year 1406, conquered that city and removed the precious MS. to Florence. It was written in the beginning of the seventh century by Greek scribes, and corrected with the greatest

§ 6 App. care, a second original being used for the purpose of emending the text. As far as Western Europe is concerned, it is on this MS. that the history of the Digest, and with it (for the Digest contains the pith of the Corpus juris) the history of Roman law in general, is, in the main, based. It also forms the basis of the numerous 'vulgate' MSS., i.e. MSS. which contain the text of the Digest as adopted by the glossators or teachers of Roman law at Bologna in the twelfth and thirteenth centuries. The vulgates however, unlike the Florentine, never contain more than a portion of the Digest.

According to the plan of study laid down by Justinian for the schools of law, only Books 1–23, 26, 28, and 30 of the Digest were to be the subject-matter of the professorial lectures during the first three years of the course. This will explain why the copy of the Florentine MS., which was at first chiefly in use throughout Italy, stopped short at Book 23, or rather Book 24, tit. 2, the first two titles of this book being very closely connected with Book 23. This was called 'Digestum' simply. Books 24, 25, 27, 29, 31–36, however, were to be *privately* studied in the fourth year. Hence a few, but only very few, of the Italian MSS. are copies of the Florentine from Book 24, tit. 3, to Book 36. [The last fourteen books formed no part of the regular curriculum at all, but were reserved for private study at a later period.] The Bolognese text was fixed by reference to an incomplete MS. of this second part of the Digest which broke off in the middle of Book 35, tit. 2, lex 82 (ad leg. Falcidiam) before the words 'tres partes.' It was not till the complete Florentine MS. had again become known that the defective MS. of the second part of the Digest could be supplemented and (for the sake of symmetry) brought up to the end of Book 38. Hence this part was given the name of 'Digestum infortiatum' (=fortiatum, 'strengthened'), and was subdivided into the infortiatum proper (up to 'tres partes') and the so-called 'tres partes' (from 'tres partes' to the end of Book 38). The re-discovery of the Florentine MS. also made it possible to make up the third part of the Digest (Book 39 to the end) which came to be known as the 'Digestum novum.' In contradistinction to the Digestum novum, the name of 'Digestum vetus' was applied to that portion of the Digest which had been known long before (Books 1–24, tit. 2). See v. Scheurl, ZS. für RG., vol. 12, p. 143 ff.; Karlowa, Röm. RG., vol. I (1885), p. 1027 (note).

Thus the vulgate MSS. of the Digest consist of three 'volumina,' the Digestum vetus (Books 1–24. 2), infortiatum, with the tres partes (Books 24. 3—38), and novum (Books 39–50). These MSS. have little value as they are in all three parts but copies of the Florentine, the mistakes of which they invariably reproduce. [Towards the end of the Digest, for example, the Florentine has two pages placed in the wrong order; all the MSS. referred to have the same mistake.] What critical value they possess is due to the fact that, as far at least as Book 33, they contain,

in several places, as compared with the Florentine MS., certain emendations, additions and alterations which must have been suggested by a second original at a time when the Digest copies in use only went as far as 'tres partes.' The text given by Mommsen in his great edition of the Digest (Digesta Justiniani Augusti, 2 voll.: 1870) is based on his own critical researches which are laid before us in the same work. He is entitled to the full credit of having elucidated all the above-mentioned facts concerning the MSS. of the Digest. § 6 App.

2. *The Institutes.*

There were very numerous copies of the Institutes, and they were much more widely read, even in the early middle ages, than the more voluminous Digest. The most valuable MSS. for our purposes are those of Bamberg and Turin, both of the ninth and tenth centuries. The latter (which is unfortunately incomplete) contains an important gloss (the 'Turin gloss on the Institutes') which was written in the time of Justinian.

3. *The Code.*

The Code has been handed down to us in a comparatively incomplete form. This is probably due to its not being prescribed as the subject of professorial lectures at all, being left to private industry in the fifth year of study. A Veronese palimpsest (of the same date as the Florentine MS.) was at one time complete, but is now full of lacunae. The remaining MSS. are all based on epitomes of the first nine books of the code, the last three books being omitted as dealing merely with the public law of the Byzantine Empire. These epitomes, with a few supplements, we possess in MSS. of Pistoja, Paris and Darmstadt, of the tenth (or eleventh), eleventh, and twelfth centuries respectively. They were gradually completed again by successive writers, beginning with the close of the eleventh century. Towards the end of the twelfth century MSS. of the last three books were written, but the first nine were always regarded as the code proper, and the 'tres libri,' as they were called, have been handed down to us in a separate form. The Greek constitutions, which were left out in all the Western MSS. ('Graeca non leguntur'), were added much later in the prints of the humanist epoch (the sixteenth century) from Byzantine sources both of ecclesiastical and secular law. In the same prints an attempt was made to restore, as far as possible, the inscriptions and subscriptions of the imperial decrees which had been very much neglected in the MSS.

4. *The Novels.*

The first knowledge which the West obtained of the Novels is derived from the so-called Epitome Juliani, being a collection of extracts from 125 novels of Justinian by Julianus, professor of law in Constantinople,

§ 6 App. A.D. 556. At a later period, the glossators found another collection of 134 complete novels, of which some were in original Latin, the majority however in a Latin version (the 'versio vulgata') made from the Greek original. It is probable that this collection is identical with the official one which Justinian ordered to be drawn up for Italy in the year 554 A.D. [Zachariae v. Lingenthal, Sitzungsberichte der Berliner Akademie, 1882.] The glossators called this collection (in contradistinction to the Epitome Juliani) the Authenticum, or Liber Authenticorum (i.e. the 'authentic collection'), and divided the ninety-seven novels which they considered to be of use, into nine collationes and ninety-eight titles. Excerpts from the latter were inserted in the respective passages of the code, and were called 'authenticae.' In addition to these Western collections there is also a Greek collection of 168 novels—not all by Justinian however—every one of which is composed in Greek.

Having thus briefly reviewed the state of the MSS., we are now in a position to understand why, in the earliest editions, the glossators divided the whole Corpus juris into five volumes, with the addition of the glossae. The first three volumes comprised the Digest (vol. 1, Digestum vetus; vol. 2, Digestum infortiatum; vol. 3, Digestum novum), the fourth contained the first nine books of the Code, the fifth (called 'volumen parvum,' or 'volumen' simply), the last three books of the Code, the Authenticum and the Institutes.

The division with which we are now familiar is into four parts in the following order: Institutes, Digest, Code, Novels. This division was first adopted by Gothofredus in his complete edition of 1583 (without the glossae). He was also the first to give the entire collection the name by which it is now universally known, viz. the Corpus juris civilis. It is only from the time of Gothofredus onward that the Corpus juris appears in the now familiar shape of one complete book.

§ 7. *Fundamental Conceptions.*

I. The Conception of Law and the Legal System[1].

Law, in the abstract, is the sum of moral rules which grant to persons, living in a community, a certain power over the outside world. Law, in other words, determines, defines, and distributes the relations of power within the limits of human society and in accordance with that ideal of justice, which resides, in the first instance, in the community of a people, and, through it, in the

[1] Cp. A. Merkel, *Juristische Encyklopädie* (1885), p. 5 ff.

community of mankind at large, and the ultimate source of which is the belief in divine justice[2]. § 7.

Of relations of power there are two kinds. The power of a person may relate, firstly, to a material thing, or something representing the value of a thing, or, secondly, to a person, i. e. to a free will. The relations of power subsisting between persons and the world of things, or the equivalents of things, are the subject-matter of private law. Private law, in other words, has to do with the dominion of persons over *things*. Its pith is, therefore, contained in the law of property. The subject-matter of public law are the relations of power which subsist between persons and persons. Here, the power is ideal, in the sense that its object is the free will of another, i. e. something invisible and outwardly intangible. Public law, then, has to do with the dominion of persons over *persons*. The rights of control with which private law is concerned are reducible to a money value; the rights of control with which public law is concerned are not thus reducible. In private law, again, the subject of a right appears in his *individual* capacity, as *commanding* the world of material things. In public law, on the other hand, the subject of a right appears in his capacity *as a member of a community*, which it is his part *to serve* in order that he may share in the benefits it confers. Finally, as against their object, the rights of private law merely confer a power, the rights of public law, on the other hand, impose, at the same time, a duty on the person to

[2] This is the reason why originally no distinction was made between moral law and juristic laws. It is only gradually that nations learn to comprehend the special character of the latter. They fail to recognize, at the outset, that the justice realized by laws, in the juristic sense, is necessarily but an imperfect *human* justice, in its nature inseparable from definite outward forms, and that its realization is sought solely in the interests of a definite outward regulation of the relations of power which subsist between members of a community. It is not, therefore, the function of juristic, but of moral laws, to produce the moral freedom of the individual; all juristic laws can do is to render such freedom possible. It has been observed that 'the point of view of a "jus quod populus sibi ipse constituit" is still quite foreign to the primitive law of the Aryan nations' (the *dharma* of the Indians, the θέμις of the Greeks, the *fas* of the Romans), 'their laws are closely interwoven with their religion and their moral code; they are bound up with the belief in the gods which belongs to the Aryan gentes, the belief, namely, that the gods shield what is right and punish what is wrong.' In later times we have, as opposed to fas, the 'jus' (Greek δίκαιον). Leist, *Altarisches Jus Gentium* (1889), pp. 3, 4.

§ 7. whom the right pertains. The distinction is clearly exemplified in the case of a right of ownership in a thing, on one side, and the right of a sovereign over his people, on the other.

Public law includes Constitutional and Administrative law, International law, Criminal law, Ecclesiastical law, the Law of Procedure and the so-called Pure Family law (e. g. the law concerning the conclusion and dissolution of marriage). Private law is, strictly speaking, coextensive with the Law of Property. There are, however, good reasons for the usual method of including in the exposition of private law an account of the family relations themselves (§ 19).

> L. 1 § 2 D. de just. et jure (1, 1) (Ulpian.): Hujus studii duae sunt positiones, publicum et privatum. Publicum jus est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.

II. The Origin of Law.

Law may originate in one of two ways. Firstly, it may spring unconsciously from the convictions and life of a people. The law thus begotten is called Customary law. Secondly, it may originate in the conscious act of the sovereign power, which act is, in point of form, quite arbitrary. The law thus begotten is called Statute law. Statute law rests on force and owes its formal validity to the command of the sovereign power. Customary law rests on national conviction and owes its validity to the fact that, having sprung from national conviction, it has asserted itself by voluntary observance in virtue of an inward necessity.

> L. 32 § 1 D. de leg. (1, 3) (Julian.): Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus quod dicitur moribus constitutum. Nam cum ipsae leges nulla alia ex causa nos teneant, quam quod judicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Quare rectissimum etiam illud receptum est, ut leges non solum suffragio legislatoris,

sed etiam tacito consensu omnium per desuetudinem abro- § 7.
gentur.

III. The Application of Law.

As regards its territorial limits, the positive law of Germany is either local ('particular') or general ('common'), i. e. it either applies to one special portion of Germany only ('Partikularrecht'), or it obtains throughout the whole Empire ('Gemeines Deutsches Recht')[3]. Again, the Common Law of Germany may either be subsidiary or absolute ('uniform'). It is subsidiary, where it only applies in so far as there is no 'particular' law to the contrary. It is absolute, where it overrides all particular laws that differ from it. The older Common Law of Germany, including the law of the Pandects, had only subsidiary force. The new Common Law of Germany, as created by the acts of the modern imperial legislature, claims absolute validity.

As regards the individual, a law may be either absolute or permissive. A law is permissive, if its operation can be excluded, in each separate case, by the private will of the individual. The rule of Roman law that the vendor of a thing is answerable for latent defects is a case in point. A law is absolute, if its operation cannot be excluded by the private will of the individual. The rules of law concerning the forms of wills or bills of exchange are cases in point. Most rules of law are absolute. The Romans sometimes use the term 'jus publicum' or 'jus commune,' in a technical sense, to express an absolute rule of law, even where such rule is one of private law.

L. 38 D. de pactis (2, 14) (Papinian.): Jus publicum privatorum pactis mutari non potest.

L. 7 § 16 eod. (Ulpian.): Quoties pactum a jure communi remotum est, servari hoc non oportet.

IV. Law and Right.

German writers distinguish between 'objectives Recht' and 'subjectives Recht.' The former is what we call 'law,' or '*a* law'; the

[3] The law of the Pandects, though now confined to the so-called Common Law countries, is still called 'Common German Law,' because it formerly applied to the whole of Germany.

§ 7. latter is what we call a 'right,' i.e. a power or authority conferred by law, e.g. the 'right' of a creditor against his debtor.

V. Law and Equity.

Law is described as 'rigid' or 'strict' ('jus strictum'), in so far as it refuses to take into account the particular circumstances of the individual case. For example: jus strictum, as such, declines to consider whether a debtor, in becoming a party to a transaction, was acting under the influence of fraud. Law is described as 'equitable' ('jus aequum'), in so far as it allows the particular circumstances of the individual case to be taken into account. Jus aequum appears frequently in the form of law which is an exception to the ordinary law (the so-called 'jus singulare'), in so far namely as it permits the consideration of special circumstances, *by way of exception*, in certain cases only[4]. Jus singulare is called 'privilege' (in the objective sense) in so far as its benefits affect particular classes of persons. 'Privilege,' in the subjective sense, is a particular right conferred on a definite person by a 'lex specialis.'

L. 14 D. de leg. (1, 3) (PAULUS): Quod vero contra rationem juris receptum est, non est producendum ad consequentias.

§ 8. *Jurisprudence.*

Jurisprudence has a twofold function to perform: firstly, a practical one; secondly, an ideal one.

I. The Practical Function of Jurisprudence.

The practical function of jurisprudence is to adapt the raw material of law for practical use. For the law, as begotten by custom or statute, is but the raw material, and is never otherwise than imperfect and defective. Even the wisest of legislators cannot foresee all possible contingencies that may arise. It is the function of jurisprudence to convert the incomplete and defective law which it receives at the hands of customs and statutes into a law which shall be complete and free from omissions. In other words, it is its

[4] As to the conception of 'jus singulare,' cp. Eisele, *Jhering's Jahrbücher für Dogmatik*, vol. 23, p. 119 ff.

function to transform the raw material into a work of art. A two- § 8.
fold activity is required for the performance of this task: the rules of law must first be ascertained; when ascertained, they must be worked out and unfolded.

In the first place, then, jurisprudence must ascertain what the rules of law are which it receives directly from customs and statutes. This it does by means of Interpretation. Juristic interpretation is either 'grammatical' or 'logical.' If it is an interpretation of the letter, i. e. of the words as they stand, it is called 'grammatical'; if it is an interpretation of the sense by reference to the context as well as the origin and object of the rule of law, it is called 'logical.' Logical and grammatical interpretation must always be combined, the former, in many ways, rectifying the results of a mere interpretation of the letter. When it extends the grammatical interpretation of the words, it is called 'extensive,' when it restricts it, it is called 'restrictive' interpretation. A grammatical interpretation which would assert the letter of the law contrary to its sense, i. e. in defiance of its logical interpretation, would be a proceeding 'in fraudem legis.'

L. 17 D. de leg. (1, 3) (Celsus): Scire leges non hoc est verba earum tenere, sed vim ac potestatem.

L. 29 eod. (Paulus): Contra legem facit, qui id facit, quod lex prohibet, in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit.

Having thus ascertained the rule of law, jurisprudence must next proceed to develop, or work out, its contents. A rule of law may be worked out either by developing the consequences which it involves, or by developing the wider principles which it presupposes. For one rule of law may involve a series of more specific rules of law; it may be a major premiss involving a series of minor premisses. Or again, the given rule of law itself may be the consequence of more general rules; it may be a minor premiss presupposing certain major premisses. The more important of these two methods of procedure is the latter, i. e. the method by which, from given rules of law, we ascertain the major premisses which they presuppose. For having ascertained such major premisses, we shall find that they

§ 8. involve, in their logical consequences, a series of other legal rules not directly contained in the sources from which we obtained our rule. The law is thus enriched, and enriched by a purely scientific method. When a given rule of law is so used as to lead us, by an inductive process, to the discovery of a major premiss, the ascertainment of new rules by means of the major premiss thus discovered is termed the 'analogical application' of the given rule of law. The application, then, of a principle (a major premiss) which is *given*, we call Inference; the application of a principle which we have *found*, we call Analogy.

The scientific process by means of which principles are discovered which are not immediately contained in the sources of law may be compared to the analytical methods of chemistry. It is in this sense that Ihering has spoken of a 'juristic chemistry[1].' Jurisprudence analyses a legal relation which is regulated by a rule of law into its elements. It discovers that amidst the whole mass of legal relations which are for ever emerging into new existence from day to day—endless and apparently countless—there are, nevertheless, certain elements, comparatively few in number, which are perpetually recurring merely in different combinations. These elements constitute, in the language of Ihering, the 'alphabet of law[2].' The common element, for instance, in every agreement, whether it be an agreement to purchase, to hire, to institute a certain person heir, to deliver, &c., is just *the agreement*, in other words, the expression of consensus. An exhaustive enumeration of the legal rules concerning sales must necessarily include certain rules bearing on this element in every contract of sale, viz. the expression of the concordant will of the parties. Thus from the legal rules concerning sales we gather certain major premisses, or general rules, concerning this element of 'agreement,' which rules will accordingly determine the requirements that are necessary to constitute an agreement, the effect of error, of conditions, or other collateral terms, and so forth. They are major premisses involving a countless variety of other legal rules,

[1] v. Ihering, *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwickelung*, Part 3, subdiv. 1 (2nd ed. 1871), p. 11.

[2] *Geist des Röm. R.*, Part 1 (3rd ed. 1873), p. 42.

which will assist us in fixing the conditions under which other agreements, say, to hire, to deliver, to institute some one heir, and many others, are effectually completed, subject, of course, to such modifications as may be necessitated by a different set of major premisses. Thus, in applying the method of analogy to a rule of law, we are, at the same time, discovering the ingredients of the legal relations. The method of analogy does not mean (as the lay mind is apt to imagine) the application of a given rule of law to a legal relation of a somewhat *similar* kind. Such an analogy would be the very opposite of scientific jurisprudence. It is the application of a given rule not to a merely similar relation, but to the *identical* relation, in so far as the *identical* element (to which the given rule had already assigned its proper place) is traceable in a legal relation which is apparently different. § 8.

These, then, are the methods by which jurisprudence fills up the blanks which it finds in the law, and moulds the whole into completeness. The discovery of the elements which recur in every legal relation brings with it the discovery of rules of law which meet the just requirements of every legal relation. The mode of proceeding may be either by Analogy, i. e. by the discovery of those elements and the analysis of legal relations; or by Inference, i. e. by the practical application of those elements and the synthesis of legal relations. It is not by the legislator, but by scientific jurisprudence, that the complexity of human relations is regulated.

II. The Ideal Function of Jurisprudence.

Jurisprudence fulfils its practical function by effecting a material addition to our rules of law. It fulfils its ideal function by means of the *form* in which it presents these rules of law. For, as in the abundance of matter we are fain to look for the unifying conception which underlies the whole, so in the abundance of legal rules we instinctively search for the one idea which dominates all. It is the ideal task of jurisprudence to satisfy this desire for unity which exists in the mind of man. With this purpose in view, jurisprudence, in expounding the law, will avoid the use of the imperative form, in other words, it will avoid a simple enumeration of legal rules. It prefers to deal, on the one hand, with the facts, or groups of facts,

§ 8. which produce juristic effects; and, on the other hand, with the juristic effects annexed to these facts, or groups of facts, with a view to arranging both facts and effects under definite categories or conceptions, which it defines. A scientific exposition, for example, would never run as follows: If a thing has been delivered to you under a contract of sale, you have a right to keep it, and a third party into whose possession it comes, is bound to hand it over to you. The scientific exposition would be in this fashion. Firstly, ownership is a right, unlimited in its contents, to exercise control over a thing. Thus we get the conception of 'ownership.' Secondly, ownership can be acquired by traditio, occupatio, usucapio, &c. (each of these terms being defined). Thus in place of a series of legal rules we have a number of abstract conceptions, partly of rights, partly of facts. When this is done, the abstract conceptions appear to govern those very rules of law on which, as a matter of fact, they depend, and from which they have been gained. Jurisprudence deduces from the conceptions of ownership, delivery, &c., the several positive rules of law, the identical rules, namely, which it had previously, as it were, put into those conceptions. In point of form, then, the positive character of law is merged in the predominance of abstractions, and jurisprudence proceeds as though it evolved those laws spontaneously from general principles. And it is precisely by this means that the craving of the human mind for unity, and its repugnance to the predominance of matter, is satisfied.

Each conception, once gained, urges us to rise to still higher ones, and thus the ideal instinct of the science of law begets a desire for a *system of law*, i. e. for a form of representation in which the whole body of law shall come before us as the spontaneous evolution of one single conception, the conception, namely, of *Law*: this done, matter will sink into the background and make way for the victorious Idea.

PART I.

THE DEVELOPMENT OF ROMAN LAW IN ITS PRINCIPAL STAGES.

§ 9. *Introduction.*

§ 9. ROMAN law, in the course of its development, underwent a process of transformation from the local law of the city of Rome to the universal law of the Roman Empire. The history of Roman law accordingly divides itself into two great periods: (1) the Period of Local Law, which extends down to the last century of the Republic; (2) the Period of Universal Law, which is the period of the Empire. The first period is marked by the prevalence of the so-called 'jus civile,' which is the rigid, formal, national (i. e. Latin) law of Rome. The second period is marked by the prevalence of the so-called 'jus gentium,' i. e. the equitable law, free from formalism, which sprang from the mutual interaction of Greek and Roman influences.

CHAPTER I.

Roman Law as the Law of the City of Rome.

§ 10. *The Twelve Tables.*

§ 10. Jus civile is the name given to the local law of the city of Rome. It was set forth, for the first time, on a larger scale, in the legislation of the Twelve Tables, B.C. 451, 450 (A.U.C. 303, 304). The Twelve Tables mark, at the same time, the starting-point in the development of Roman law, so far as it can be historically authenticated, a development which, after steadily advancing in uninterrupted progression, finally culminated in the Corpus juris civilis of Justinian.

The characteristics of early Roman law, as we find it, or suppose it to have existed, in the Twelve Tables, are formalism and rigidity.

All private dealings between man and man are, at this time, governed by two juristic acts: (1) 'mancipatio'; (2) 'nexum.'

1. Mancipatio.

Mancipatio is the solemn sale of early Roman law[1]. In the presence of five witnesses (cives Romani puberes) a skilled weigh-master (libripens) weighs out to the vendor a certain amount of uncoined copper (aes, raudus, rauducsculum) which is the purchase-money, and the purchaser, with solemn words, takes possession of the thing purchased as being his property.

> Gajus, Inst. I. § 119: Est autem mancipatio . . . imaginaria quaedam venditio: quod et ipsum jus proprium civium Romanorum est. Eaque res ita agitur: adhibitis non minus

[1] Bechmann, *Der Kauf nach gemeinem Recht*, vol. 1 (1876), and, in reference to it, Degenkolb in vol. 20 (p. 481 ff.) of the *Krit. Vierteljahrsschrift*.

quam quinque testibus civibus Romanis puberibus et praeterea alio ejusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit, aes tenens ita dicit: HUNC EGO HOMINEM EX JURE QUIRITIUM MEUM ESSE AJO ISQUE MIHI EMPTUS ESTO HOC AERE AENEAQUE LIBRA; deinde aere percutit libram idque aes dat ei a quo mancipio accipit, quasi pretii loco. § 10.

Before the Twelve Tables, when there was as yet no coined money, the weighing out of the aes by the libripens constituted or, at any rate, might constitute the actual payment of the purchase-money. Mancipatio was not an 'imaginaria venditio,' but a genuine sale. But the decemviri introduced coined money into Rome. The first coin used was the copper 'as,' the silver denarius not being introduced till 269 B.C. These changes, however, did not affect the formalism of mancipatio. The libripens and the weighing still remained, in spite of the fact that the weighing out of uncoined aes had ceased to constitute payment. For the payment implied in the ceremonial of mancipatio was now a purely fictitious one, and the actual payment was a matter quite independent of the mancipatio. Hence the enactment of the Twelve Tables that no mancipatio should be legally operative unless the price were actually paid or, at least, security given for it[2]. Thus mancipatio continued to be a real sale, and on principle it was a sale for ready money, a narrowly circumscribed transaction clothed in rigid formalities and only available for a single economic purpose. The mancipatory sale was the only valid form of sale which was known, and was thus at the same time the only private legal transaction by which, at this stage of the jus civile, property could be conveyed.

[2] Cp. § 41 I. de rer. div. (2, 1): Venditae vero et traditae (res) non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore vel pignore dato. Quod cavetur quidem etiam *lege duodecim tabularum*. — It seems certain that the text which the framers of this passage in the Institutes had before them, contained the words: venditae vero et *mancipatae* (not traditae) res. It was only in the course of the subsequent development that this rule was extended to res venditae et traditae (inf. § 12). It must still remain a moot point whether the giving of security for the price (by vadimonium, inf. § 67, note 1) was really put on the same footing as the actual payment thereof as early as the Twelve Tables.

§ 10. No alienation of property, therefore, was legally valid unless it satisfied the following conditions: it must be for valuable consideration; it must be done in the presence of five witnesses and the libripens; the thing to be alienated must be before the parties, and only so many things can be alienated in any one transaction as the purchaser can take hold of (manu capere) at one and the same time. Thus if more things are to be mancipated than the alienee can take hold of at once, the whole ceremony of mancipatio must be repeated anew each time [3]. Such was as yet the clumsy and backward condition of the law which governed the ordinary dealings between man and man.

2. Nexum.

Next to mancipatio we have, in the second place, the 'nexum,' or solemn loan. In the presence of five witnesses the libripens weighs out to the borrower the corresponding amount of raw metal, and the lender at the same time declares in solemn words that the borrower is now in his debt (dare damnas esto). The borrower is now under an obligation to repay. He is said to be 'nexus' to his creditor, i. e. he has directly pledged his own person for repayment of the loan, and thus stands already in precisely the same position as a judgment debtor. Here, again, the effect of the introduction of coined money is that the loan, as executed in the nexum itself, is a mere form, the actual loan being an independent matter. Nevertheless, as in the case of mancipatio, so here, the material character of nexum as a transaction subserving one definite purpose only, remains intact. For nexum cannot be employed to create any kind of debt, but solely a debt based on a loan [4]. Thus we see that the law of contract, too, is narrow and meagre, like the whole life of this early period.

[3] It appears from a document recently discovered in Pompeii that even in the first century of our era it was necessary, in mancipating several slaves, to repeat the whole mancipatio ceremony specially for each separate slave. Cp. Eck, vol. 1. p. 87 (Romanist. Abt.) of the *ZS. der Sav. St.*

[4] This follows from the legal rules about nexi liberatio (inf. § 76). It appears, therefore, that in nexum as well as in mancipatio the material character of the transaction must have been brought out in the ceremonial in some way or other, so that just as the purchaser did not acquire ownership by the bare form of mancipatio alone, so here the debtor did not incur an obligation by the bare form of the nexum alone.

We have stated that mancipatio is a ready money transaction. § 10.
It does not, as such, bind the purchaser to pay the price, but only makes such payment a condition precedent to the passing of ownership. Nexum, on the other hand, is a transaction on credit. Its effect is to place the borrower under an obligation to repay. If he fails, the debt will be followed by execution.

Execution proceeds directly with inexorable rigour against the person of the debtor. He falls into the power of his creditor, who may bind him and cast him into chains. After having thrice publicly invited some one to come forward and release him, the creditor may—in default of any one appearing, and after the lapse of sixty days—regard the debtor as his slave, and may either kill him or sell him 'trans Tiberim,' i. e. into a foreign country, say, Etruria. If several creditors have claims upon one and the same debtor, the law allows them to cut the debtor into pieces, and provides that a mistake in the division shall in no wise prejudice their rights.

> XII tab. III. 1–4: Aeris, confessi rebusque jure judicatis, XXX dies justi sunto. Post deinde manus injectio esto. In jus ducito. Ni judicatum facit aut quis endo eo in jure vindicit, secum ducito, vincito aut nervo aut compedibus XV pondo, ne minore, aut si volet majore vincito. Si volet, suo vivito. Ni suo vivit, qui eum vinctum habebit, libras farris endo dies dato, si volet plus dato. 6: Tertiis nundinis partis secanto. Si plus minusve secuerint, se fraude esto.

The rigour of the private law finds its counterpart in the rigour of the family power. Within his family the paterfamilias is an absolute sovereign; he has power over the life and liberty of any member of the household. The only external checks on the exercise of his legal rights are furnished, not by the law, but by religion and custom.

§ 11. *The Interpretatio.*

The Twelve Tables had exhibited early Roman law in a form corresponding to its tendency, the form, namely, of a popular statute.

§ 11. In the original stages of its development the law of Rome, like that of other nations, was of the nature of customary law. The Romans, however, looked upon customary law as an inferior kind of law. Their innate sense of form could not rest satisfied with a species of law which is comparatively intangible, formless, and difficult of proof. True, there were some rules of customary origin which possessed the full force of law (legis vicem), rules resting on immemorial usage which the legal habits of the nation had gradually shaped into precision. But, generally speaking, it was held that the magistrate in administering justice was not absolutely bound by rules of mere customary law, and that in dealing with such rules he was justified, within certain limits, in exercising his free discretion. But a Lex (publica), i. e. a rule of law which magistrate and people had agreed upon by means of a solemn declaration of consensus, was a different matter[1]. The authority of a lex was irrefragably binding on the magistrate.

In the Twelve Tables, Roman law had, to a considerable extent, received the form of a lex[2]. It is to this fact that the success and

[1] Lex (Icelandic: lag, lög; Frisian: laga, lag, log; Anglo-Saxon: lagu, lah; Saxon: lach; English: law) means literally that which is 'laid' or 'fixed,' in other words, 'a statute.' In the language of the Romans lex means anything which is 'laid down' or 'settled,' and which, being proposed in a certain form by one party, is accepted by the other (e. g. the 'lex commissoria' inf. § 59). A 'lex publica,' then, is a covenant, or statute, proposed by the magistrate and accepted by the people, which binds the community in virtue of this reciprocal declaration. Cp. Mommsen, *Röm. Staatsrecht*, vol. 3, pp. 303, 309; A. Pernice, *Formelle Gesetze im Römischen Recht* (Festgabe für Gneist), 1888.

[2] Some isolated laws were made as early as the regal period. Servius Tullius, for instance, is credited with some laws on contracts and delicts. The 'leges regiae,' however, which were collected in the so-called 'jus civile Papirianum' (probably a private compilation dating from the close of the Republic), owe their name, in all probability, merely to the fact that the regulations they contain were placed under the immediate protection of the kings (in precisely the same way as the name of 'royal laws' was applied to early Attic regulations of ceremonial ritual, merely because their administration was the official duty of the Archon Basileus; v. R. Schöll, pp. 88, 89 of the *Sitzungsberichte der Bayerischen Akademie d. Wissenschaft*, 1886). These 'leges regiae' are concerned, in the main, with 'sacred' matters, i. e. they are essentially of a religious and moral character, and bear clear testimony to the closeness of the original connection between law and religion. It is probable that, in substance, the majority of them actually date back to the time of the Kings. Bruns, *Fontes*, p. 1 ff.; Mommsen, *Röm. Staatsrecht*, vol. 2 (3rd ed.), p. 41 ff.; Karlowa, *Röm. RG.*, vol. 1 (1885), p. 106; Voigt, *Die leges regiae* (1876); P. Krüger, *G. der Quellen u. Literatur des Röm. R.* (1888), pp. 4–8; Jörs, *Röm. RW.* (1888), p. 59 ff.

popularity of the decemviral legislation is due. So far as it was codified, at any rate, the law was now secure from the arbitrary powers of the magistrate who administered it. § 11.

L. 2 § 1 D. de orig. juris (1, 2) (Pomponius): Ex quidem initio civitatis nostrae populus sine lege certa, sine jure certo primum agere instituit omniaque manu a rege gubernabantur.

Tacitus, Annal. III. 27: compositae duodecim tabulae, finis aequi juris.

The decemviral legislation being accomplished, the energies of the three succeeding centuries were concentrated in the task of thoroughly working out its contents. During the Republic, changes by statute, in matters of private law, were exceptional, and the function of interpreting and, at the same time, developing the laws of the Twelve Tables was left, in the main, to the operation of the existing legal agencies. The period of legislation was followed by the period of interpretation.

The exigencies of commerce demanded new regulations. How to represent these new regulations as virtually contained in, and covered by the statutory force of, the law of the Twelve Tables, was thus the problem to be solved. The notion of formally superseding the law of the Twelve Tables, which was statutory, by conflicting rules of law, which were merely customary, would, at that time, have appeared well-nigh inconceivable to the Romans. For throughout the long period of one thousand years, extending down to the final stage in the development of Roman law, i.e. down to the Corpus juris civilis of Justinian, the legal force of the Twelve Tables, as the source of all Roman law, was all along regarded as remaining, in theory, unimpaired, in spite of the fact that, when the end came, there was not a stone in the entire structure of the decemviral laws but had long been displaced from its original position. And this was quite in keeping with the conservatism of the Romans and the extreme caution with which they proceeded in all matters of law. Not one letter of the Twelve Tables was to be altered, and yet the new spirit was to be infused into the old letter. The decemviral legislation being complete, the time had arrived for an 'interpretatio'

§ 11. which should develop and even alter the law, but should, at the same time, leave the letter of the law intact.

The period of interpretation covers the later centuries of the Republic. At the outset the work of interpreting the law, i.e. of carrying on, in its initial stage, the development of the jus civile, was performed by the pontiffs. It was regarded as the special professional duty of the pontiffs to preserve the knowledge of the laws of the Kings. In consequence more particularly of the knowledge they thus possessed and also of their general scientific learning, it became their office to assist with legal advice not only magistrates in regard to the exercise of the jurisdiction vested in them, but also private parties in regard to the steps to be taken in concluding contracts and carrying on lawsuits (inf. § 15). Thus it happened that the business of interpreting the subsisting law, and thereby developing the civil law, fell under the control of the pontiffs.

It was by means of such interpretation that the so-called 'In Jure Cessio' was now developed. In jure cessio was a new way of conferring a legal title by means of a fictitious lawsuit before the magistrate. The beginnings of in jure cessio probably date back to a time anterior to the laws of the Twelve Tables, but its full development belongs to a period subsequent to these laws. The Twelve Tables provided that whenever one party to an action, at the suit of the other, at once admitted his opponent's title in person before the magistrate ('in jure'), no judgment should be required, and the party confessing should be regarded as already condemned (confessus pro judicato est) [3]. The confession before the magistrate

[3] That the maxim 'confessus projudicato est' (l. 1 D. 42, 2) occurred in the Twelve Tables in some form or other, either directly or indirectly, seems a reasonable inference from the statement of the jurist Paulus (Vat. fr. 50): 'et mancipationem et *in jure cessionem* lex xii tab. confirmat.'

It is extremely probable that the starting-point in the development is to be found in the fictitious suit on a question, not of ownership, but of *status*, such a suit being first employed for purposes of manumission. Livy tells us (ii. 5) that it first came into use in the beginning of the Republic, which would be not long before the Twelve Tables. The oldest times knew of no juristic act by means of which a manumission could be effected. In jure cessio was thus invented in order to render manumission possible, and was used for the first time (according to the legend reported by Livy) in favour of the slave who discovered the conspiracy of the sons of Brutus.

In an in jure cessio the fictitious defendant himself directly confesses that he has no title. As distinguished from the judgment of a judex which only operates

had the force of a judgment. Thus, in a suit about ownership, the magistrate could at once proceed to award the thing to the plaintiff (the 'addictio'). In other words, if a person confessed before the magistrate that his opponent in the action was the owner, he was divested of his ownership, if at the moment of the confessio he was still owner. This suggested a general method for transferring ownership. If A desired, on any legal ground whatever, to transfer his ownership in a thing to B, A and B would go before the magistrate, B (the intended transferee) would claim ownership, A (the intended transferor) would admit his title, and the magistrate would then pronounce his award (addictio) in favour of the transferee. Thus the transferor was divested of his ownership and the transferee was invested with it. A rule of procedure (confessus pro judicato est) had been utilized for developing a new kind of private juristic act, the act of transferring ownership by means of a fictitious vindicatio (in jure cessio), and one the validity of which could be represented as resting on the Twelve Tables. The same process could be utilized for the purpose of establishing patria potestas and effecting the manumission of a slave by means of a fictitious vindicatio 'in patriam potestatem' and 'in libertatem' respectively. Thus in jure cessio became the medium through which a whole host of new juristic acts were introduced into the working system of Roman law [4]. § 11.

clearly to *ascertain* a legal relationship already in existence, this self-condemnation of the defendant (cp. nexum, p. 26) is tantamount to a valid disposition (cessio), i. e. it operates not to ascertain, but to *constitute* a legal relationship. This is the reason why, on principle, the judgment of a judex only operates 'inter partes,' i. e. its effect is confined to the parties themselves, whereas, on the other hand, the self-condemnation *produces* a new legal relationship. The confessus in jure is divested of his right, and that even though he may fail to effect a transfer of it to the other party (cp. e. g. § 96, end of n. 3). This is the foundation of the legal force of in jure cessio against third parties as well, for the disposition which is implied in the confessio in jure confers on the other party a title available against every one. See, on this question: Demelius, *Die Confessio im Röm. Civilprozess* (1880), p. 98 ff; Pernice, *ZS. der Sav. St. für RG.*, vol. 9, p. 203 (Romanist. Abt.).

[4] In jure cessio was used for the purpose (1) of manumission (manumissio vindicta, inf. § 21); (2) of emancipation (§ 89); (3) of adoption (§ 87); (4) of assigning the tutela legitima mulierum (§ 90 n. 2); (5) of assigning the hereditas (but only the hereditas legitima, § 96 n. 2); (6) of transferring ownership, both in res mancipi and res nec mancipi (§ 49); (7) of creating any kind of servitude (mancipatio being only available for the creation of rustic servitudes, § 56, iv.) The procedure was the same in all cases, whether the

§ 11. Another juristic act was developed in a similar manner by utilizing a penal provision of the Twelve Tables. This was the 'emancipation' of the filiusfamilias. The Twelve Tables enacted that, if a father sold his son thrice into bondage, he should suffer the penalty of forfeiting his patria potestas.

XII Tab. IV. 2 : Si pater filium ter venumduuit, filius a patre liber esto.

The 'interpretatio' utilized this rule. The father might sell his son, by a purely imaginary sale, thrice repeated, into the bondage of another who would manumit the son after each sale by means of in jure cessio. The effect of this transaction was the 'emancipation' of the filiusfamilias, i. e. he was discharged from the paternal power; for the conditions required by the Twelve Tables had been complied with. The father had thrice sold his son into bondage, consequently the son was now free from the paternal power. A different adaptation of the same penal rule led to the development of the 'datio in adoptionem' (§ 87).

Of all the changes the most important was the transformation which mancipatio underwent in the course of the century subsequent to the Twelve Tables. The Twelve Tables enacted :

XII Tab. VI. 1 : Cum nexum faciet mancipiumque [5], uti lingua nuncupassit, ita jus esto.

subject-matter of the claim were liberty, patria potestas, tutela, hereditas, ownership, or servitude. The alienee first makes a fictitious vindicatio in his own favour, the alienor then confesses 'in jure,' and the magistrate gives his award (dictio, addictio) accordingly. The use of in jure cessio in cases 2, 3, and 7 can be assigned with certainty to a period subsequent to the Twelve Tables. The same is to be said of 4 and 5, because the sphere within which they are applicable is determined by the Twelve Tables themselves, in jure cessio being only available for the assignment of a tutela *legitima* mulierum and a hereditas *legitima*. Only the first case belongs most probably to a period anterior to the Twelve Tables (note 2, sup.), but very possibly owes its general and unquestioned validity to the interpretation based on the Twelve Tables. It should also be observed that not every tutela legitima was transferable by in jure cessio, but only the tutela legitima *mulierum*. This fact shows that at the time when in jure cessio was coming into use, the tutela legitima impuberum was already regarded as an 'officium' and, as such, was unassignable, whereas the tutela legitima mulierum retained its original character of a special power which existed in the interest of the (agnatic) guardian, and might therefore be treated as assignable. Both the cases in which in jure cessio was applied, and also the limitations which were imposed upon its use, point to the conclusion that it was not developed at a very early period.

[5] Mancipium is the name given here to mancipation.

That is to say, the formal juristic act was to operate in the manner defined by the solemn oral declaration (nuncupatio). Utilizing this rule, the interpretation changed the nature of mancipatio. It was the intention of the Twelve Tables that mancipatio should be a genuine sale, and it was essential for its validity that the purchase-money, as specified in the mancipatio, should be actually paid down. But there was nothing to prevent the parties from naming in the ceremony of mancipatio, not the real price, but a fictitious one, and the payment of this price would suffice to call into play the operation of mancipatio as a legal conveyance, and thus, at the same time, to evade the rule as to the necessity of paying the price. And this is what actually happened at a later stage. The outcome of this device was the so-called 'mancipatio sestertio nummo uno.' In the mancipatio a declaration was made that the thing was being sold for 'one sesterce,' and, the alienee having paid his sesterce[6], ownership passed to him in virtue of the Twelve Tables. So far then as mancipatio took the form of a 'mancipatio sestertio nummo uno,' it had passed from a genuine to a purely fictitious sale (imaginaria venditio)[7]. § 11.

The result was that mancipatio developed into a general mode of conveying ownership as such, quite irrespective of the legal ground on

[6] It will be observed that the handing over of the aes (rauducsculum), which was part of the mancipatio ceremony, was not sufficient. The requirement of the Twelve Tables concerning the payment of the price had also to be satisfied, and this was done by the payment of the nummus unus. True, such a proceeding was in violation of the spirit of the Twelve Tables, but the letter was strictly adhered to. And it was precisely in this that the peculiar nature of the interpretation lay: while professedly but interpreting the letter of the old law, it was really building up new law.

[7] A fictitious sale of this kind was resorted to, when it was desired, e. g. to make a gift, pledge, &c., by mancipatio (cp. p. 34). But mancipatio nummo uno was also available in the case of real sales, and possessed then a twofold advantage, one in favour of the purchaser, the other in favour of the vendor. The purchaser was benefited in that the ownership passed by the mere payment of one sesterce, the rule of the Twelve Tables touching the necessity of paying the price being thus evaded. The vendor was benefited in this wise. According to the Twelve Tables, if the purchaser in mancipatio were evicted from possession of the thing mancipated by a person whose title was superior to his (the vendor, e. g. not having been the real owner), the latter (i. e. the vendor) was compellable by an 'actio auctoritatis' to indemnify the purchaser to the extent of double the price solemnly named ('nuncupated') in the mancipatio. In the case of a mancipatio nummo uno 'double the price named' meant two sesterces, i. e. practically nothing. Thus, by means of the mancipatio nummo uno the 'actio auctoritatis' was also excluded in spite of the Twelve Tables.

§ 11. which such conveyance took effect. It could now be employed for a variety of purposes. It was, for instance, available for the purpose of making a gift. But there was another and a more important use to which it could be turned: the so-called 'mancipatio fiduciae causa' had now become practicable. This mancipatio fiduciae causa, or, briefly, 'fiducia,' was a *qualified mancipatio* which imposed a duty on the transferee, and it was a transaction, the nature of which rendered it conveniently available for economic purposes of the most multifarious kinds. Thus the change from the old mancipatio to the new was the change from a transaction narrow in character and circumscribed in application, to one free from inward restrictions and capable of adaptation to an indefinite variety of uses.

'Fiducia' is an agreement of trust, whereby the transferee in a mancipatio undertakes to divest himself of the ownership which has been conveyed to him, and more especially—in certain circumstances—to remancipate the thing he has received.

Suppose, for instance, that a debtor desired to give his creditor a pledge. A transaction by which a person made his property simply liable for an existing debt, in our sense (a 'hypothec'), was unknown to early Roman law. But mancipatio in its new shape would meet the necessities of the case. The debtor mancipated the thing to the creditor 'for one sesterce,' and thus constituted him owner by means of an imaginary sale. But the creditor held the legal ownership subject to a 'trust' (fidei or fiduciae causa), and the fiducia was to the effect that on payment of the debt the creditor should reconvey ('remancipate') the thing to the debtor. The creditor thus got his security, and meanwhile he was the owner of the thing pledged. But as soon as the debtor discharged the debt, the fiducia or trust-clause gave him a right to claim the thing back again. Other agreements could be concluded in the same way. In the case of the pledge just described there was a 'fiducia cum creditore contracta.' In precisely the same manner the so-called 'fiducia cum amico contracta' could be used for the purpose of effecting a depositum, commodatum, or mandatum in accordance with the forms of the civil law. Thus, whether the thing were delivered for safe custody—as in the case of depositum—or for specific use, as in the

case of commodatum; or, again, were delivered on terms that the transferee should, for instance, sell it, or give it to a third party, or (if the object were a slave) should manumit such slave—as in the case of mandatum—in all such cases the transferor (deponens, commodans, mandans) made the transferee (depositarius, commodatarius, mandatarius) formally owner of the thing delivered, but the ownership was held subject to a trust, 'fiduciae causa'; it was purely formal, and involved an obligation to abide by the terms of the agreement on which the mancipatio was based. § 11.

There was no reason why the agreement that ownership should pass subject to a trust, should not be set forth in the formula used in the mancipatio (the 'nuncupatio') [8]. The existence of a fiduciary duty was thus clearly established by the solemn act itself, but to embody the entire agreement in the nuncupatory formula was scarcely feasible. The mancipatio itself, therefore, said nothing about the *terms* of the trust; for these it was necessary to look to the 'pactum conventum,' a formless collateral agreement. But, according to early Roman law, no action can be taken on a formless pact. Is then, a 'pactum fiduciae' actionable or not? The early jurists argued this way. Inasmuch as the pactum conventum as such is *not* actionable, that which is promised in the pactum cannot, as such, be enforced by an action. But the duty to deal with the object 'in good faith' *is* actionable. Having been clearly set forth in the solemn mancipatio this duty falls, of course, under the protection afforded by the rule of the Twelve Tables: 'uti lingua nuncupassit, ita jus esto.' The transferee thus became liable to an 'actio

[8] The inscription, No. 5402, in vol. 2 of the Corp. inscr. lat., shows that this was actually done: D... fundum B... nummo I *fidi fiduciae causa mancipio accepit*. Cp. on this point, Degenkolb, *ZS. für RG.* vol. 9, pp. 172, 174; Voigt, *Die zwölf Tafeln* (1883), vol. 2, p. 166 ff. Thus the words 'fidi fiduciae causa' formed part of the mancipatory act itself. But in this inscription the agreement which defined the conditions of the trust follows the words evidencing the mancipatio in the shape of an independent 'pactum conventum,' and thus proves that the said agreement was a matter apart from the mancipatio. The document recently discovered in Pompeii which contains a fiducia is full of gaps, so that it is impossible to say whether the trust clause was inserted in the mancipatio or not. But here again, the pactum dealing with the position of the fiduciary transferee, follows the words evidencing the mancipatio in the shape of an independent agreement. Cp. Eck, *ZS. der Sav. St.*, vol. 9, pp. 89, 96, 97.

§ 11. fiduciae.' It is important to observe what it was precisely that the plaintiff in this action could require the defendant (i.e. the transferee in the mancipatio) to do. He could not call upon him to do what he had promised in the pact, because the pact had not been 'nuncupated.' But he *could* call upon him to do that which any honourable and trustworthy man could be reasonably expected to do having regard to the circumstances of the case, the most important of which was, of course, the pactum conventum itself. In other words, what the judge had to find out was *not* whether the defendant had acted up to the precise terms of the pact—for the pact being formless, its terms were still quite unenforceable—but whether the defendant had conducted himself in such a way, 'ut inter bonos bene agier oportet et sine fraudatione[9].' Since the pactum conventum lay outside the solemn mancipatio, the fiducia did not give rise to an actio stricti juris[10], but to a so-called 'actio bonae fidei,' i. e. the extent of the obligation which it produced was not fixed by any hard and fast line, but rather by the judge exercising, within fairly wide limits, his free judicial discretion[11]. In fiducia we have the first recognized instance of a contract different in kind from the legal transactions which had been handed down from olden times. For the extent of the obligation en-

[9] If the judge decided against the defendant, the judgment did not mean that he (the defendant) had failed to meet a legal obligation, but rather that his conduct in the matter had *not been that of a man of honour*. This is the reason why condemnation in an actio fiduciae entailed infamy (cp. § 25). Cp., on this point, v. Jhering, *Das Schuldmoment im römischen Privatrecht* (1867), p. 29 ff., and next note.

[10] Differing, in this respect, from other collateral agreements in mancipatio which were fully covered by the terms of the nuncupatio. Such were, e. g. the trusts imposed on the familiae emtor in the mancipatory will (inf. § 99).

[11] The actio fiduciae was an 'actio in factum concepta.' (Cp. Lenel, *ZS. der Sav. St.*, vol. 3, roman. Abt. p. 112). Lenel himself has, however, pointed out (*Das Edictum perpetuum*, 1883, p. 234) that nothing is thereby proved in regard to the later origin of this action. But the fact of its being an actio in factum concepta seems rather to point to the conclusion that, in the old times, the actio fiduciae was tried by means of the legis actio per judicis postulationem (inf. § 35, ii). See Voigt, loc. cit. p. 475 ff.—At a later time, the other actiones bonae fidei seem also to have first come into use in the shape of actiones in factum conceptae. For since an informal promise was originally not legally, but only morally binding, the plaintiff was precluded from setting up a legal claim which the defendant had not satisfied, and could only allege some fact which went to show that the defendant's conduct in the matter was unjust. This explains the connection between the actio bonae fidei in its earliest form and the actio ex delictu. Cp. n. 9, sup., and the passage from Jhering referred to.

gendered by these transactions was rigorously determined by the letter of the agreement; in fiducia, on the other hand, it was equitably determined in accordance with the free discretion of a 'bonus vir,' taking into account all the circumstances of the case. It was a contract which placed the *existence* of a liability beyond all doubt, but which was neither designed nor able to fix, in set terms, its precise *contents*. § 11.

Thus the interpretation of the Twelve Tables, in dealing with mancipatio, the formal, rigorous, ready-money sale of the early law, had produced a twofold result:

(1) It had developed a formal method for conveying ownership for any purpose whatsoever;

(2) It had developed a whole series of transactions (negotia bonae fidei) based upon *credit*, being the various cases of fiducia, which were concluded 're,' by performance, that is, by mancipation (sestertio nummo uno)[12].

With regard to Nexum, no corresponding development took place. Nexum remained what it had been, a loan-transaction, and was subsequently superseded as such by the formless loan called 'Mutuum' (§ 12). The sole trace of the original severity of the formal contract of loan is to be found in the fact that mutuum was a negotium stricti

[12] After the example of mancipatio fiduciae causa an in jure cessio and coëmtio (§ 79) 'fiduciae causa' came subsequently into use. Just as the transferee in mancipatio (n. 7) declared that he took the legal ownership 'cum fiducia,' so, in the case of in jure cessio, the person making the fictitious vindicatio declared that he was only owner 'fiduciae causa.' The vindicatio, therefore, was made, as in other cases, 'adjecta causa.' Cf. Voigt, loc. cit. p. 172. In every instance the solemn declaration set forth that the conveyance of ownership, or (in the case of coëmtio) of marital power, was merely formal. Thus the extraneus with whom a woman had made coëmtio, i. e. had formally contracted a marriage, but only *fiduciae causa* (e. g. for the purpose of freeing herself from guardianship, § 91, n. 2), was not her maritus, nor was he called so; he was her 'coëmtionator,' and, as such, had neither the rights nor the power of a husband (Gaj. i. 115). The effect of the fiduciary clause was not merely obligatory, but also affected the *real* right (i. e. the right of property) itself, that is to say, *fiduciary* ownership was different *in kind* from ordinary ownership. And this is the reason why the so-called 'usureceptio ex fiducia' was possible, i. e. why it was that the transferor could, by means of usucapio, without bona fides (Gaj. ii. 59, 60), recover the very ownership he had transferred. And it was this very difference in kind that enabled the alienee in mancipatio and in jure cessio to make claim to a merely fiduciary ownership. No fiducia could, however, be concluded by means of a mere formless traditio. See inf. § 56, note on deductio servitutis.

§ 11. juris (§§ 63, 66). It was reserved for 'Stipulatio' (inf. § 67) to supply a type for all agreements in which the solemn promise of the debtor gives rise to a rigorously unilateral obligation quite irrespective of the legal ground on which such obligation is based. Stipulatio was the outcome of the ancient 'sponsio,' and resembled nexum in so far as the underlying idea in both was originally a kind of self-pledge; but it differed from nexum in that the pledge implied in stipulatio could only be enforced by the gods[13].

As the mancipatio fiduciae causa supplied the foundation for the negotia bonae fidei of a later period, so nexum is the type and basis of the negotia stricti juris, i. e. transactions which generate a rigorously unilateral obligation and leave no latitude to the discretion of the judge.

§ 12. *The Beginnings of the Jus Gentium.*

From the earliest times there must, of course, have existed in Rome, side by side with the formal juristic acts which alone enjoyed the sanction and force of the jus civile, a countless variety of transactions which were despatched without any form whatever. It happened, as a matter of course, that many a sale was made by simple delivery of the article and payment of the price, many a loan, too, contracted by simple handing over of the money, and so on. In other words, there were informal sales, loans, deliveries (with a view to transferring ownership in things), and so forth. But according to the early civil law all these informal proceedings were

[13] Sponsio was the name originally given to a contract which was concluded by a libation, i.e. by a formal self-denunciation, to the following effect:—Even as this wine now flows, so may the punishing gods cause the blood of him to flow who shall be the first to break this covenant. (Cp. Leist, *Gräco-italische Rechtsgeschichte* (1884), p. 457 ff.). The original obligation created by such a promise was a purely moral, or religious one, partaking largely of the nature of an oath. It was not till later that it assumed a legal character (cp. § 67). When Cicero says that to 'spondere, promittere' is to 'obligare fidem,' his words seem to point to some surviving notion of a pledge of one's moral self (cp. A. Pernice, *Labeo*, vol. i. (1873), p. 408). German law confirms the view that all the oldest contracts originated in some kind of pledge (obligatio), whether of one's person or of portions of one's property. Cp. e.g. J. Kohler, *Shakspeare vor dem Forum der Jurisprudenz*, vol. i. (1883), p. 52 ff.: Heusler, *Institutionen des deutschen Privatrechts*, vol. i. (1885), p. 104.

totally devoid of legal validity. That which was effected by an informal sale was, of course, a transaction, but not a juristic transaction. Thus if A sold and delivered something to B which did not belong to him, and B were evicted by the true owner, he had no action against A. There was no question of *law* at all; the whole relationship between A and B was purely one of *fact*, and might, in this respect, be compared to our position in dealing with savage tribes. We may sell to them, and barter with them, but no *legal* relations, no actionable rights, are called into existence. § 12.

There was, however, one element which was bound, in the long run, to secure the legal recognition of these formless transactions. This element was the *foreign trade*, in so far as it was carried on within the confines of Rome. Every alien, i. e. non-citizen, was, as such, absolutely debarred from the use of any of the formal juristic acts of early Roman law. Mancipatio as well as nexum was, on principle, null and void, if one of the parties, nay, if one of the witnesses, were without the Roman civitas. Thus, even though a foreign merchant, i. e. one who did not enjoy the privileges of Roman citizenship, were quite willing, in doing business in Rome, to observe the forms, say, of mancipatio, it would have been useless, because the mancipatio would have been none the less void. The result was that the commercial dealings of aliens in Rome, including, therefore, the dealings of aliens with Roman citizens, were at all times confined, without option, to the formless transactions just referred to. For aliens these were the only juristic acts. Of course such a system could not last. The commercial transactions of the foreign merchants could not remain permanently outside the pale of the law, and some method had to be devised by which they should obtain legal validity not only if both parties were aliens, but also if one of them were a Roman citizen. Inasmuch, moreover, as even Roman citizens, among themselves, were making daily and habitual use of these informal acts, it was quite obvious that their gradual recognition by the law was a matter of pressing importance to citizens and aliens alike.

At a subsequent period the law under which aliens traded in Rome assumed a shape which served to bring out the full significance

§ 12. of the process with which we are here concerned. In the course of the first centuries of its history (down to about 250 B. C.), the Roman community frequently concluded international and commercial treaties with other states (as, for example, Carthage), members of which were permitted to engage in commerce in the Roman market. By these treaties legal protection and legal capacity were reciprocally guaranteed to members of the communities concerned, the legal protection being secured in Rome by means of the courts of 'recuperatores.' Thus, by the second commercial treaty with Carthage, every Roman enjoyed, in Carthage, in regard to his commercial dealings, the same private rights as a Carthaginian citizen; and the Carthaginian enjoyed, conversely, corresponding rights in Rome (i. e. the 'commercium'). In this way it came to pass that a portion of the Roman civitas, viz. the jus commercii, was granted to non-citizens (peregrini), to such, namely, as possessed the privileges of an international treaty of friendship. Aliens of this kind were accordingly permitted to avail themselves of the juristic acts peculiar to the jus civile. These treaties, however, only affected certain specified foreign communities, and even in these first centuries there were many peregrini in Rome who were shut out from the privileges they bestowed, and had no option but to use, in their dealings, those formless transactions which (as we have seen) produced, in the first instance, relationships of mere fact, devoid of all legal sanction. The position of affairs, then, was this. Some aliens were excluded from the use of the solemn acts of the Roman jus civile, others, however—and their number was considerable—were empowered to trade under the full sanction of the civil law. In other words, the gates of the jus civile had been thrown open to such aliens as enjoyed by treaty the friendship of Rome. But all this changed after about the third century B. C. Rome becomes the great power which only condescends, in quite exceptional cases, to deal with other powers on terms of equality by means of treaties of friendship. Numerous communities are annihilated by the Roman state; their members are incorporated with the Roman community without any treaty and without being placed on a footing of equality with Roman citizens ('dediticii'). The Roman civitas now becomes

a valuable privilege. Even the mere jus commercii is only granted to non-citizens in exceptional cases, and the jus civile thus shuts its gates to the world without. The bulk of aliens whose business carries them to Rome have no legal capacity under the jus civile. It is at this stage of the movement that the true importance of foreign trade, so far as it is denied the privileges and protection of the jus civile, becomes strikingly manifest. It has, in fact, been raised to the rank of an independent power confronting the jus civile in Rome itself, with distinct legal habits and distinct juristic acts (informal acts) of its own. It has now become absolutely impossible to maintain the old rule that the transactions of non-privileged aliens are not legally binding, and a law is imperatively demanded which shall recognize, govern, and sanction such transactions. In Rome a special judge for foreigners, a 'praetor peregrinus,' was appointed in 242 B. C. This marks the final victory of the movement. We have now a law for the citizen, as such, the jus civile, and, beside it, a *law* for the alien, as such, the jus gentium. Thus there sprang from the intercourse with foreigners the second great power in the working system of Roman law, viz. the jus gentium, and it was the very exclusion of aliens from the privileges of the jus civile which rendered the birth of this new force possible. It is certain that the contents of the jus gentium were largely determined by the example of such laws as had come to regulate the rights of aliens in other commercial centres of the age. The legal convictions of foreign nations struck root in Rome itself and appeared in the form of the jus gentium. In addition to this, we must not fail to bear in mind that from this same time onwards the ancient national character of Rome was steadily yielding to the inroads, increasingly powerful, of foreign, more especially Greek, elements bearing within them the whole accumulated force of Hellenic culture. The whole world came, so to speak, to make Rome its capital, and with it came the jus gentium, a law, not for any particular state, but universal; a law not merely for the citizen, but for the *private person as such*. The jus gentium came to fulfil its twofold vocation. It was destined not only to shape and determine the legal rights of aliens in Rome, but also to guide and direct the Roman civil law itself. For by securing

§ 12.

§ 12. the legal recognition of formless transactions, i. e. such as depend for their effect not on any *form*, not on something visible, external, or tangible, but rather on the *will* of the parties themselves, the jus gentium was laying down the lines of a new development for the law governing the ordinary dealings between Roman and Roman [1].

In this way it gradually came to be acknowledged that legal ownership (in res nec mancipi) could be validly acquired by means of a formless traditio. The only qualification seems to have been that such traditio, in order to pass ownership, must take place in pursuance of a sale, and the purchaser must have actually paid the price. For the rule of the Twelve Tables that no ownership could pass to the vendee unless he actually paid the price or were given credit for it by the vendor, was deemed to apply, in an equal measure, to the transfer of ownership by traditio [2]. The principle that, in sales, ownership could pass by traditio, was then extended from sales to traditio in general, provided only the parties had concluded some transaction which placed the intention to convey ownership beyond doubt. Thus the necessity for a solemn mancipatio was, in the end, confined to certain classes of things only, viz. those comprised under the collective name of 'res mancipi' (§ 49), in dealing with which it seems probable that, from the oldest times, mancipatio was, as a matter of fact, almost universally employed. Those 'res' comprised all such things as constituted, properly speaking, a farmer's stock-in-trade: his land (fundus Italicus), his slaves, his live-stock (beasts of draught and carriage). All other things were 'res nec mancipi,' so that simple delivery (traditio) was sufficient for the purpose of conveying ownership. Such would be, e. g. money, articles of dress, tools, &c., in short, all such things as were intended not so much for permanent possession as for commercial intercourse.

In the same way as informal traditio thus obtained the sanction of law, so informal sales, loans, &c., gradually secured legal recognition.

[1] On the above subject, v. M. Voigt, *Jus naturale*, vol. 2, § 16, 21 ff.; Mommsen, *Röm. Staatsrecht*, vol. iii. (1887), pp. 590 ff., 600 ff; Jörs, *Röm. RW. zur Zeit der Republik* (1888), pp. 114 ff., 126 ff.; Ad. Schmidt, *ZS. der Sav. St.* vol. 9, p. 137 ff.: Eisele, *Abhandl. zum röm. Civilprocess* (1889), pp. 69 ff., 100.

[2] Cp. § 41 I. de rer. div. (2, 1), sup. p. 25, n. 2.

§ 12. The old-fashioned formalities of the Roman jus civile found themselves confronted with the exigencies of a world-wide commerce. The new demands which had thus arisen had won their first victory towards the close of the Republic by securing the recognition of a number of formless juristic acts. The whole future course of development was virtually involved in this recognition. Thus the end of the Republic marks the commencement of that process by which the local law of the city of Rome was gradually converted into that which Roman law was destined, at a future time, to be, viz. the general law of the civilized world.

CHAPTER II.

Roman Law as the Law of the World.

(The Empire.)

§ 13. *Jus Civile and Jus Gentium.*

§ 13. Jus civile is the local law of a city. It was destined to be replaced by the jus gentium, a general law for the civilized world.

The local law of Rome had already adopted a number of juristic acts which were all characterized by formlessness, ease of application, and free adaptability (§ 12).

The Romans themselves had not failed to observe that their law already contained two distinct ingredients, one of which operated by virtue of its form, and was derived from their old jus civile, while the other was free from formal elements, and owed its adoption and validity as law to the contact between the commerce of Rome and that of the world at large. The former bound none but Roman citizens to whose mutual dealings it alone applied, and the latter was binding on, and applicable to, the peregrini as well. The former kind of law, which was specifically Roman, was now called jus civile in the special and narrower sense of the term, the 'jus proprium civium Romanorum[1].' The jus gentium, on the other hand, came to be regarded as a universal law of all mankind, common to all nations, because resting on the nature of things and the general sense of equity which obtains among all men, the 'jus gentium quod apud omnes gentes peraeque custoditur,' a sort of natural law, exacting recognition everywhere in virtue of its inherent reasonable-

[1] In modern phraseology 'civil law' is used for 'private law' simply; the Romans meant by civil law the law which obtains among 'cives.'

ness. It would, however, be erroneous to suppose that the Romans § 13.
attempted to introduce a code of nature such as the philosophers had devised. The jus gentium was, and never had been anything else but a portion of *positive Roman law* which commercial usage and other sources of law, more especially the praetorian edict (§ 14), had clothed in a concrete form. Nor again must it be imagined that the Romans simply transferred a portion of foreign (Hellenic) law bodily into their own system. In the few quite exceptional cases where they did so (as e. g. in the case of hypotheca), they did not fail to impress their institutions with a national Roman character. The antithesis between jus civile and jus gentium was merely the outward expression of the growing consciousness that Roman law, in absorbing the element of greater freedom, was commencing to discard its national peculiarities and transform itself from the special local law of a city into a general law for the civilized world. *The jus gentium was that part of the private law of Rome which was essentially in accordance with the private law of other nations*, more especially with that of the Greeks which would naturally predominate along the sea-board of the Mediterranean. In other words, jus gentium was that portion of the positive law of Rome which appeared to the Romans themselves in the light of a 'ratio scripta,' of a law which obtains among all nations and is common to all mankind.

The value of the division of Roman law into jus civile and jus gentium was not merely theoretical, but also eminently practical. The law which now governed the intercourse of foreigners—Greeks, Phoenicians, Jews—in Rome was, of course, Roman law, but it was Roman jus gentium, and the Roman jus civile, in the new and narrower sense of the term, was confined on principle to the mutual dealings of Roman citizens (cp. § 22). The jus gentium was thus, at the same time, the Roman law for foreigners, i. e. the law which governed the transactions of the peregrini. And it was but natural that such should be the case, since it was the influence of foreign intercourse that had given the jus gentium its shape.

There is a moment in the history of every nation when the claims of a natural sense of justice assert themselves and revolt against the

§ 13. hard and fast austerities of ancient traditional forms. The Romans had now arrived at this stage. The jus gentium was in its nature the equitable law whose growth and expansion, in opposition to the jus strictum of ancient tradition, proceeds henceforward with ever increasing volume. The whole tendency of the history of Roman law pointed to the suppression of the jus strictum by this new equitable law, and to the consequent destruction of the ancient jus civile by the jus gentium. But it must not be imagined that the development was a very sudden one. Such a course would have been entirely alien to the legal instinct of the Romans. The jus gentium did not come down like a hurricane and sweep away the jus civile. The slow and gradual elaboration of a system of equity alongside the older and stricter law, was rather the work of a patient and uninterrupted development extending over a period of more than five hundred years. When, in the natural course of things, the vitality that once filled the forms of the jus civile had passed from them, leaving them but hollow relics of a bygone age, then, but not till then, were they finally discarded. Slowly, cautiously, and, as it were, bit by bit, portions of a freer and more equitable law were worked out and tested, first one, then another, and finally incorporated in the organism of Roman law. The reform of Roman law was the result of a vast series of small changes of detail. And it was only by painstaking care of this description, by scorning all appeals to vague general principles of equity, that the Romans, aided by that keen sense of form, moderation, and legality, which with them was hereditary, could succeed in reducing the jus aequum to a body of principles lucidly conceived, minutely elaborated, and carefully weighed in all their details. By such a method alone could Roman law, while its contents were freely developing over so vast a field, preserve intact throughout that artistic power which moulds and subdues its materials, and erects them into a firm harmonious structure. It is this power which has made Roman law, and more especially Roman private law, what it is: a model for all times to come such as has never since been equalled.

In working out the jus gentium, i. e. those rules of natural equity which regulate the dealings between man and man, and in reducing

these rules to a system of marvellous transparency and lucidity, § 13. which carries irresistible conviction by its form as well as its matter to the mind of every observer, in doing this, Roman law has performed its mission in the world's history. And it was this achievement, successfully performed for all times to come, that not only fitted Roman law for becoming the general law of the Roman empire, but also endowed it with the power, when once it had emerged from the oblivion of centuries, to conquer the modern world.

There were three agencies whose influence in working simultaneously and successively at this identical task, viz. the developing and importing of the jus gentium, was decisive of the ultimate result. These were the praetorian edict, Roman scientific jurisprudence, and imperial legislation.

CICERO de offic. III. 17 : Societas enim est, latissime quae pateat, hominum inter homines, interior eorum, qui ejusdem gentis sunt, propior eorum, qui ejusdem civitatis. Itaque majores aliud jus gentium, aliud jus civile esse voluerunt : quod civile, non idem continuo gentium, quod autem gentium, idem civile esse debet [2].

CIC. de off. III. 5 : Illud natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus. Neque vero hoc solum natura, id est jure gentium, sed etiam legibus populorum, quibus in singulis civitatibus res publica continetur, eodem modo constitutum est, ut non liceat sui commodi causa nocere alteri.

GAJ. Inst. I. § 1 : Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure

[2] In the last sentence Cicero is not *criticising* the jus civile and conveying an opinion that it *ought* to accommodate itself to the jus gentium. He is simply expressing the fact that that only can be jus gentium which actually obtains everywhere in the separate systems of positive municipal law, more particularly in Roman municipal law, or jus civile, in this sense of the term. Jus civile is not necessarily jus gentium, i. e. it does not necessarily obtain everywhere, but jus gentium is necessarily jus civile, because law which obtains everywhere must necessarily obtain with us, failing which it would not be jus gentium, i. e. law which obtains everywhere. Jus civile is here used, not in the narrower sense of the specifically Roman law, but in the sense of municipal law, and is therefore used for Roman law simply. What is not law among the Romans, can obviously not be regarded as obtaining 'apud omnes gentes.' In this, the wider sense of the term, jus civile includes jus gentium within its limits, and jus gentium is thus not opposed to, but forms a portion of, Roman law.—In Verr. I. 13 Cicero calls the jus gentium 'communia jura,' 'common law.'

§ 13. utuntur: nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est vocaturque jus civile, quasi jus proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur.

§ 14. *The Praetorian Edict.*

In the year 367 B. C. the judicial functions were separated from the consular power, and a special officer, the praetor urbanus, was appointed to administer justice in the city. Subsequently (about 242 B. C.) the increase of commerce necessitated the appointment of a second praetor, the praetor peregrinus, to whom all disputes were assigned where one or both of the parties were peregrini. The jurisdiction of the praetor urbanus was henceforth confined to matters in dispute between Roman citizens themselves.

During his year of office, the praetor, like the consuls before him, was invested with the ancient judicial power of the king[1]. That is to say, in administering justice he was authorized to exercise his sovereign judicial discretion, being, formally, only bound by the letter of the leges or popular enactments, and by such customs as ancient tradition had endowed with the force of laws (sup. p. 28). It is important to bear this fact in mind in order to appreciate the peculiar importance of the praetorian 'edict.'

An edict is an order promulgated by a magistratus populi Romani. A praetorian edict, therefore, is an order promulgated by the praetor. It deals with the principles by which the praetor intends to be guided in his administration of justice, in other words, in the exercise of his free judicial discretion. It is not likely that the praetor began to

[1] The word 'praetor' means literally a general, and is a title of honour accorded to the consuls in the first centuries of the Republic (Mommsen, *Röm. Staatsrecht*, vol. ii. p. 71 ff., 2nd ed. 1877). The praetor was really a third consul who was specially entrusted, not with the military command, but with the administration of justice. This is the reason why, in point of rank (and in the number of his lictors), he was inferior to the consul, though, on principle, his power was consular (Mommsen, ib. p. 185 ff.).

proclaim such edicts from the very outset. He would, of course, in the first instance consider the administration of the existing law his sole task, so that it was naturally a very gradual process by which definite principles peculiar to the praetorian jurisdiction were developed—principles which, when developed, tended more and more to constitute the praetorian power the organ of reaction against the principles of civil law. It was thus but gradually that an occasion arose for the praetor to promulgate any orders in regard to the granting of legal assistance. It would seem, however, that, even at an early period, it was usual to post up in the praetor's court a list of legal formulae for the better information of the parties to an action, e. g. of formulae for the interdicts for which application had to be made to the praetor—interdicts being commands by means of which the praetor, in the exercise of his executive powers, granted an extraordinary remedy (inf. § 43)—and, again, of formulae for the processual sponsiones (processual agreements) which the praetor, under certain circumstances, compelled the parties to enter on [2]. § 14.

[2] At the end of the Edictum Hadrianum there is an appendix consisting, for the most part, of nothing but formulae,—formulae, namely, for the interdicts, exceptiones and stipulationes (processual sponsiones). There is no internal reason whatever to justify the grouping together, at the end of the edict, of these formulae, more especially of the formulae for the exceptiones and stipulationes. And the arrangement seems all the more unreasonable, because the edicts which deal with the praetorian stipulationes (i. e. which direct their conclusion) and the stipulationes themselves are placed in entirely different parts of the Edictum and are thus completely detached from one another; and, further, because the exceptiones and the subject-matters to which they respectively belong are, in like manner, totally disconnected. It seems most natural to look to history for an explanation of so strange an anomaly, to the fact, namely, that this appendix contains the beginnings of the praetorian 'album,' the tablet of formulae, with, of course, a number of subsequent additions, which was left in the very order in which, in the course of time, it had shaped itself. The absence, in this tablet of formulae, of the 'actiones' or forms of action, is explained by the fact that, at the time of the procedure by legis actiones, the praetor had no power in regard to the drawing up of the formulae for actions. The legis actiones, which were elaborated and developed by the pontifical jurisprudence, owed their publicity not to the praetor, but to private compilations (the jus Flavianum, Aelianum; inf. p. 59). Subsequently, when the formulary procedure had come into use, the praetor published the formulae relating to actions as well, and arranged them in their proper place among the edicts. The older formulae, however, were left where they were and formed a special section—the appendix—of the album. This hypothesis assumes that the legal remedies grouped together in the appendix are all as old as the period of legis actiones. That this is true of the interdicts and praetorian stipulationes can be asserted with sufficient certainty. As regards the exceptiones, the fact under discussion might perhaps be considered

§ 14. In addition to this tablet of formulae other tablets gradually came into use, which contained the orders of the praetor concerning matters of law, i. e. the edicts. After the introduction of the formulary procedure (v. infra) the 'actiones' or formulae for commencing an action were also published in tablets. A kind of new Tables of Law thus arose side by side with the twelve bronze tables which were to be seen, not far away, in the forum Romanum, and on which was engraven the old jus civile of Rome. The praetorian tables being only intended to last for a year were simply made of wood painted white, and were for this reason called collectively 'album.' Nevertheless these wooden tablets were destined to outlast the bronze ones. For they represented those principles of law which metamorphosed and finally swept away the ancient laws of the decemviri. The term 'album' or 'edict of the praetor,' as applied to the whole, is due to its outward form, the formulae prescribed by the praetor (the publication of which was not, in the legal sense, an edict) being thus included with the edicts proper under the collective title of 'the Edict[3].'

It is probable that, from an early date, it was the business of every new praetor, on taking office, to revise the tablets of formulae and put up new ones. For it was obvious that these tablets, being made of wood, would serve, at most, for the one year of office. What had been a traditional usage in the case of the formulae became, from

an argument in favour of the view that the insertion of an exceptio was possible, not indeed in the 'lege agere,' but in the proceeding called 'per sponsionem agere' (the processual sponsio), which can be traced back to the period of legis actiones: v. Karlowa, *Der römische Civilprocess zur Zeit der Legisactionen*, p. 101 (1872). In that case the placing of the formulae of exceptiones before those of sponsiones would not be accidental.—On this subject v. Wlassak, *Edict und Klageform*, p. 22 ff. (1882); Karlowa, *Röm. RG.* vol. i. pp. 462, 463.

[3] The arrangement of the Edictum Hadrianum is based on the antithesis between the ordinary and extraordinary legal relief administered by the magistrate. The first main part of the Edict deals with the exercise of the 'jurisdictio,' i. e. the ordinary form of legal relief; the second with the exercise of the 'imperium' (in the narrower sense of the term), i. e. that extraordinary form of relief administered by the magistrate in virtue of the imperative powers of his office (v. inf. § 48). Preceding the two main parts we have an introductory section dealing with the rules for regulating judicial proceedings up to the appointment of the judex. Appended we have a concluding section dealing with execution and appeals. Then follows the appendix, discussed in note 2, dealing with interdicts, exceptiones and stipulationes, and, last of all, the aedilician edict. Lenel, *Edictum perpetuum*, p. 12 ff. (1883).

the very outset, a matter of necessity in the case of the edicts. For § 14.
the edict was only valid during the year of office of the praetor who issued it. Thus when the new praetor came in, he had to publish anew 'the Edict' as a whole: ut scirent cives, quod jus de quaque re quisque dicturus esset: l. 2 § 10 D. de O. J. (1, 2).

The edict which the praetor issues on taking office is called the 'edictum perpetuum.' It is intended to be valid for the whole term of his year of office. The opposite of the edictum perpetuum is an extraordinary order issued by the praetor during the year of office for such unforeseen occasions as may arise (prout res incidit). The edictum perpetuum or, as we shall in future call it, the 'edict' simply, is not a statute, nor is it originally even a source of law at all. For the very magistrate who had issued the edict might arbitrarily disregard it[4], till a lex Cornelia (B. C. 67) made it illegal for a praetor to depart from his edictum perpetuum. But even then the validity of the edict expired with the year of office of the praetor who had issued it. The new praetor was not bound by the edict of his predecessor. He could repeat it or alter it, as he chose. It was, however, but natural that a custom should soon establish itself for each praetor, on taking office, regularly to repeat a large portion of the edict (the 'edictum tralaticium'), and confine himself merely to additions (nova edicta, novae clausulae[5]). Thus a regular system of

[4] But in such a case his colleague might intercede. Cic. in Verrem, act. II. lib. I. 46 § 119: Tum vero in magistratu contra illud edictum suum sine ulla religione decernebat. Itaque L. Piso multos codices implevit earum rerum, in quibus ita intercessit, quod iste aliter, atque ut edixerat, decrevisset. Cp. also § 120: Alias revocabat eos, inter quos jam decreverat, decretumque mutabat, alias inter alios contrarium sine ulla religione decernebat, ac proximis paullo ante decreverat. Thus, though it was felt to be most improper (sine ulla religione) for a praetor to violate his own edict, still his legal right to do so was an exemplification of the nature of the magistrate's judicial power; i. e. like the sovereign power of the kings, which had devolved upon him, it was formally free, subject only to the limitations imposed by definite leges.

[5] By the time of Cicero the greater part of the praetorian edict had already become tralaticium, so that Cicero describes the praetorian law—which, of course, was not based on any lex—as a sort of customary law; Cic. de invent. II. 22, 67: Consuetudinis autem jus esse putatur id quod voluntate omnium sine lege vetustas comprobavit; in ea autem jura sunt quaedam ipsa jam certa propter vetustatem; quo in genere et alia sunt multa, et eorum multo maxima pars, *quae praetores edicere consuerunt.* Cic. Verr. II. lib. i. 44. § 114: et hoc vetus edictum translaticiumque esse; 45. § 115: in re vetere edictum novum; 48. § 117: hoc (edictum) translaticium est. Mommsen, *Röm. Staatsrecht*, vol. i. p. 198, note 3 (2nd ed.).

§ 14. judge-made law grew up in the praetorian court which, in addition to the statutory and customary law already in force, became, in point of fact, one of the most potent factors in the legal system.

The praetor peregrinus had to decide disputes between aliens, and between citizens and aliens, i. e. the law he administered was the jus gentium. In the edict of the praetor peregrinus, therefore, the jus gentium acquired a written, fixed, and tangible form, and was thus, at the same time, placed in a position to exert a more powerful influence on the general development of Roman law. On the other hand, the praetor urbanus only had jurisdiction in disputes between Roman citizens. His edict dealt with Roman law in its entirety, i. e. both with the jus gentium (which of course also applied to Roman citizens) and the jus civile, in the narrower sense. The form in which the jus civile really attained to practical vitality in the praetor's court became clearly apparent in the edict of the praetor urbanus.

The praetor had no power to legislate, but he might grant or refuse an action. The old action at law (legis actio) was confined within certain inflexible formulae which had been developed by the practice of the courts in conformity with the words of the statute. All the magistrate could here do was to grant or disallow the action (legis actio). Hence it was a most important event when, by the enactment of the lex Aebutia towards the middle of the second century B.C., the formulary procedure established itself. This procedure derived its name from the fact that, under it, the lodging of the complaint resulted in a written precept (formula) being addressed by the magistrate to the judex, containing an authoritative statement of the issue in dispute, together with the principles on which the judex was to decide it (inf. § 36). The judex who heard the case (i. e. the private individual to whom the praetor, in accordance with traditional custom, referred the matter in litigation for trial and decision) was now far more dependent than formerly on the magistrate's instructions. He might be directed, under certain conditions, to disallow an action which, nevertheless, lay at civil law, or, on the other hand, to admit a claim of which the civil law knew nothing whatever. Again, as against the parties themselves, the position of

the praetor was now one of much greater freedom than before. He § 14.
had the power, not merely to refuse the action, but also to allow it, subject, however, to such conditions as to make it in certain cases tantamount to a refusal. The entire procedure was thus brought under the control of the praetor.

We can now understand how it came to pass that the praetorian law soon began to advance with rapid strides. By the time of Cicero the praetorian edict had already become the leading organ for the development of Roman law[6]. But the praetorian reform achieved its most essential result by working out that equitable law (the jus gentium) which was tending more and more to displace the harsh rigours of the old jus civile. The praetorian edict was the engine best fitted for effecting this reform—a task as important as it was difficult. As the edict was never valid for more than one year, it was a convenient instrument for giving new principles a trial. If the innovations did not answer, they could be dropped again at once. The praetors in general showed little taste for the sudden adoption of far-reaching general principles. They confined themselves rather, in the first instance, to laying down rules for a perfectly definite case, the conditions of which were clearly apprehended. The next praetor might then add some further clause to the edict of his predecessor, the third might take yet another step in advance, and so on. It was precisely on account of this objection to far-reaching generalizations that they always hesitated to strike out anything that had once found its way into the edict. They preferred the method of adding a second concrete case to the first, a method which had this further advantage that it secured accuracy of verbal expression,—an important consideration, since the praetorian edict, like the statutes, was interpreted according to its letter. Thus there grew up in the edict a kind of code of private law; on the face of it, a collection of rules on the granting of actions, admission of pleas, and so on, couched, moreover, in a style, which was not exactly Ciceronian, nor even pleasant to read. Nevertheless it was by means of this code,

[6] Cic. de legib. I. 5. 17: Non ergo a praetoris edicto, *ut plerique nunc*, neque a XII tabulis, ut superiores, sed penitus ex intima philosophia hauriendam juris disciplinam putas.

§ 14. with all its old-fashioned jargon and cumbrous phraseology, that the wisdom, experience, and foresight of bygone ages were handed down from generation to generation. It was a code which combined conservatism with a ready susceptibility of change, thus standing at the same time firmly rooted in the experience of the past and the life and movement of the present.

Praetorian law, in the shape it assumed in the edict, was not, strictly speaking, *law*, but the power involved in the right to allow or disallow actions and other legal remedies virtually raised it to the position of law. Thus we find Cicero declaring that even at his time the edict was felt to be a kind of law[7]. The praetorian law, being a law made by officials ('jus honorarium'), was opposed to the jus civile, i. e. law in the strict and proper sense of the term, the law made by the people, developed by popular enactments and popular customs. Thus both the jus civile[8] and the jus honorarium[9] contained elements of jus gentium, but in the jus honorarium the influence of the jus gentium predominated. The praetorian edict was, in the main, the instrument by means of which the free principles of jus aequum gained their victory over the older jus strictum. Though at first the edict may merely have served the purpose of giving fuller effect to the jus civile (juris civilis adjuvandi gratia), and then of supplementing the jus civile (juris civilis supplendi gratia), nevertheless, in the end, borne along by the current of the times, it boldly assumed the function of *reforming* the civil law (juris civilis corrigendi gratia).

The development of the praetorian edict reached its climax in the last century of the Republic. In the main the problem had now been solved. It was universally felt that the jus honorarium, fully matured as it was (it was already for the most part 'tralaticium'), was now entitled to rank as a second great power, equal in importance to the jus civile. But the constitutional changes which were now

[7] 'Qui plurimum tribuunt edicto, praetoris edictum *legem annuam* dicunt esse' (in Verrem, II. 1. 42).

[8] We are here using the term jus civile in its wider sense as signifying the positive law of Rome simply, whether it be jus civile in the narrower sense (of law specifically Roman), or jus gentium. When opposed to jus honorarium, jus civile means all such portions of Roman law as are based on statute or custom.

[9] i. e. the law which is only law in virtue of the edict.

beginning to take place soon opposed a barrier to the further creation of law by the praetor. For we must bear in mind that the praetor's jus edicendi was the outcome of that autocratic power which was peculiar to the ancient *republican* magistracies. The rising imperial power could not permanently tolerate any rival independent authority. But, as in all other branches of public life, so here the old forms were preserved, though in substance the way was being prepared for the new monarchical ideas. The far-seeing genius of Hadrian, at this point, recognized and, at the same time, gave effect to the necessary results of the altered political circumstances. It was never, from the outset, considered anything very abnormal for the supreme power in the state to instruct the magistrates as to how they should exercise their official power[10]. Thus some leges, and subsequently (more especially in the first centuries of the empire) a series of senatusconsulta[11], had laid down instructions which were binding on the praetors in the administration of justice and the granting or refusing of rights of action, and in so doing had indirectly contributed to determine the contents of the praetorian edict. It was from this fact that Hadrian took his cue. The time had come to prescribe to the praetor the *entire* contents of his edict. The regular reissue of the edict of the magistrate had already sunk to a mere matter of form. It would have been inconsistent with the actual position of the princeps and praetor respectively, if the latter had ventured to make important alterations in the edict without the assent of the former. And, moreover, if the praetor had attempted to make any change in his edict, which the emperor did not approve, the latter was legally empowered to disallow it by virtue of his jus intercedendi. The result was that the praetorian edict became stereotyped and barren. Its task was

§ 14.

[10] See, for example, the lex (probably the lex Aelia Sentia, 4 A. D.) which directed the praetor in dealing with property left, at their death, by certain dediticii (such namely as had become dediticii by manumission) to 'ita jus dicere, judicium reddere, ut ea fiant, quae futura forent, si dediticiorum numero facti non essent.' (*ZS. der Sav. St.*, vol. i. röm. Abt. p. 97.)

[11] e. g. the senatusconsultum Vellejanum, Tribonianum, Macedonianum; cp. Schlesinger, *ZS. für RG.*, vol. viii. p. 227, note 44; Karlowa, *Röm. RG.*, vol. i. p. 629; Krüger, *G. d. Quellen d. Röm. R.*, p. 85. As early as Livy (41. 9) we find mention of a senatusconsultum of this kind dating from the republic (177 B.C.).

§ 14. done. All that remained was to cast it into a final shape and, at the same time, to define, in a legal form, the relations subsisting between the imperial power and the edict. With a view to this purpose, Hadrian (before the year 129 A. D.) instructed the great jurist Salvius Julianus definitely to revise the edicts of the praetor urbanus and praetor peregrinus, adding, at the same time, the market-regulations (as to the liability of the vendor for faults, &c.) contained in the edict of the curule aediles. By order of the emperor, the whole was then ratified by a senatusconsultum. This is the so-called Edictum Hadrianum or Julianum [12]. The edict issued by the provincial governors—praesides provinciarum—in the administration of justice (edictum provinciale) was similarly dealt with and finally reduced to a definite form. Thus the imperial power—the effect of which was extended to the senatorial provinces by means of the senatusconsultum—rose supreme above the magistracies, appropriating, as its own, the contents of the edict with its rules on the administration of justice. Formally, however, the change was slight. The magistrate continued to administer justice and the edictal law was still, in theory, derived from his official power as its source. The praetor and, in the provinces, the praeses provinciae continued, on taking office, to issue their edict and the contents of the edict were still jus honorarium, i. e. law which existed only in virtue of the official authority of the magistrate entrusted with the administration of justice. The jus honorarium had not been converted into jus civile, because the contents of the edict had not been declared law for the whole empire [13]. The semblance of the power of the old

[12] Already towards the close of the republic the two praetorian edicts coincided in all essentials, the praetor urbanus having likewise admitted the freer jus gentium in his edict. As a rule, the contents of the edicts issued by the provincial governors also corresponded with the urban edicts. In proof of both these facts we may quote Cicero (ad Att. 6. 1. 15): dixi (viz. in the edict for his province) me de eo genere ad edicta urbana accommodaturum. Cicero was able to refer to the edicta in the plural, because the contents of both the urban edicts were already thought of as being substantially the same.

[13] The senatusconsultum would have converted the edictal law into jus civile, had it directly enacted that the contents of the edict should be law for the whole empire; for a senatusconsultum had 'legis vicem' under the empire (§ 16) and was thus a source of jus civile. But the antithesis between the magisterial law as jus honorarium, and the jus civile, was maintained. It follows from this that the provisions of the imperial enactment, which was ratified by

republican magistrates remained as heretofore. But the emperor and senate, by means of their legislative authority, had compelled the magistrate to issue the edict in the new form as finally established and in no other. In substance, therefore, it was not the will of the magistrate, but the will of the emperor that determined the contents of the magisterial edict. Thus, if it appeared that any provision of the edict was ambiguous, it was the emperor who had to be appealed to, with a view to deciding the matter by means of imperial rescript[14]. In like manner it was reserved for the emperor to have the edict, when necessary, supplemented. The edict of the praetor had become unchangeable—an edictum perpetuum in a new sense of the term, and the edictal law, in its further stages of development, was to appear in the form, not of praetorian, but of imperial law. § 14.

The praetorian law was finished. The time had come for a fresh power to enter on the scene, in order to solve a new problem which had now arisen. This power was Roman Scientific Jurisprudence.

L. 2 § 10 D. de orig. juris (1, 2) (Pomponius): Eodem tempore et magistratus jura reddebant, et, ut scirent cives, quod jus de quaque re quisque dicturus esset, seque praemunirent, edicta proponebant. Quae edicta praetorum jus honorarium constituerunt. Honorarium dicitur, quod ab honore praetoris venerat.

Asconius in Cicer. orat. pro Cornelio: Aliam deinde legem Cornelius, etsi nemo repugnare ausus est, multis tamen invitis tulit: ut praetores ex edictis suis perpetuis jus dicerent; quae res cunctam gratiam ambitiosis praetoribus, qui varie jus dicere solebant, sustulit.

the senate, were referable to the domain, not of private, but of public law. In other words, the effect of this enactment was not, directly, to make the contents of the edict law (viz. private and procedural law) for the *subjects* of the empire, but rather to determine its contents for the *magistrates*, and to bind them by public ordinance to issue the edict in the form in which it was thus arranged and no other. Cp. Krüger, *loc. cit.* (v. note 11), p. 91. As to the date when the Edictum Hadrianum was composed, cp. Krüger, p. 86; Bremer, in the *Göttinger Gelehrte Anzeigen*, 1889, p. 432 note.

[14] It is only from the time of Hadrian that the emperors begin to interfere to any perceptible degree in the administration of justice by means of their rescripts. Cp. Karlowa, *Röm. RG.*, vol. i. p. 630; Krüger, *loc. cit.* p. 94; Bremer, *loc. cit.* p. 430.

§ 14. L. 7 § 1 D. de just. et jure (1, 1) (PAPINIAN.): Jus praetorium est, quod praetores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia, propter utilitatem publicam.

L. 8 eod. (MARCIAN.): et ipsum jus honorarium viva vox est juris civilis.

The following passage may serve to illustrate the contents of the edict. It deals with the so-called in integrum restitutio propter absentiam (i. e. the rescission of an injury which a person has suffered, by operation of the law, in consequence of not having asserted his rights in time).

L. 1 § 1 D. ex quib. caus. maj. (4, 6): Verba autem edicti talia sunt: Si cujus quid de bonis, cum is metus aut sine dolo malo reipublicae causa abesset, inve vinculis servitute hostiumque potestate esset, posteave non utendo deminutum esse [15], sive cujus actionis eorum cui dies exisse dicitur; item si quis quid usu suum fecisset aut quod non utendo amissum sit [15], consecutus, actioneve qua solutus ob id, quod dies ejus exierit, cum absens non defenderetur inve vinculis esset secumve agendi potestatem non faceret, aut cum eum invitum in jus vocari non liceret neque defenderetur, cumve magistratus de ea re appellatus esset sive cui per magistratus [15] sine dolo ipsius actio exempta esse dicetur: earum rerum actionem intra annum, quo primum de ea re experiundi potestas erit, item si qua alia mihi justa causa esse videbitur, in integrum restituam, quod ejus per leges, plebis scita, senatus consulta, edicta, decreta principum licebit.

The passage shows very clearly the various clauses which have been inserted one after the other, ending with a most comprehensive general clause which is certainly the latest. It is to be observed, also, that the praetor expressly avows his magisterial discretion to be limited by statutory law, but does not mention customary law.

See, on the whole subject, especially: O. Lenel, Das Edictum Perpetuum (1883); Bruns, Fontes juris Romani antiqui, ed. 5 (1887), p. 188 ff.

[15] Cp. Lenel, *Edictum perpetuum*, p. 96.

§ 15. *Roman Jurisprudence.*

§ 15. The beginnings of Roman jurisprudence[1] date from the pontifices, who acted as skilled legal advisers in the court, first of the king, then of the consul, lastly of the praetor. Their science of law was closely bound up with their science of religion and astronomy. Theirs was the knowledge of the jus sacrum and the calendar, they alone could tell the dies fasti and nefasti, i. e. the days on which an action at law might or might not be commenced. It was a consequence of their functions as consulting assessors in the law courts that the knowledge, control and development of the formulae relating to actions (legis actiones) and to juristic acts came to rest entirely with them. Their science was the science of the letter of the law and of its technical application, interpretation and utilization (interpretatio, sup. § 11). The development of this science was exclusively confined to the college of pontifices, and its knowledge was preserved and handed down, within the same limits, by tradition and by instruction of the new members who joined. Moreover, the precedents, i. e. the early legal opinions (responsa, decreta) of the college, which formed the basis and norm of the existing practice, were preserved in the archives of the pontifices, and to these archives none but members of the college had access. Thus the business of interpretation, which was, of course, in each separate case, decisive of the form of action or juristic act, was confined to a few, and the pontifical jurisprudence came positively to be regarded as a kind of occult science, and as constituting, at the same time, a powerful weapon in the hands of the patricians (to whom the pontifices belonged) in their struggle with the plebeians. No wonder, then, that the publication by Flavius (304 B. C.) and Aelius (about 204 B. C.) of the legis actiones (i. e. the formulae of actions, in the shape which the pontifices had given them; the so-called 'jus Flavianum' and 'jus Aelianum') was regarded as a great popular act[1a]. Accordingly it marked an important

[1] On early Roman jurisprudence, cp. the recent work of P. Jörs, *Römische Rechtswissenschaft zur Zeit der Republik* (1888).

[1a] The promulgation of the calendar had already been effected by the decemviri. And the fact that the jus

§ 15. turning-point, when Tiberius Coruncanius (about 254 B. C.), the first plebeian pontifex maximus, proclaimed his readiness to give information to anybody on legal questions. True, the pontifices had, before this time, given information on enquiry, not however to every one, but only to magistrates and to persons who, as parties to an action, were practically concerned in some question of law; in other words, the information vouchsafed only applied to a particular case; it was fragmentary and afforded no insight into the system as a whole. The announcement made by Tiberius Coruncanius meant that he was also prepared to answer questions addressed to him by persons whose interest was purely theoretical, in other words, questions put by those whose object was to know the law and study the existing jus civile. The knowledge of law was to be opened up to all. Here, then, we have the first beginnings of a system of public legal instruction and —as its necessary consequence—a juristic literature. The same Aelius whom we just mentioned, surnamed 'Catus,' 'the cunning' (Sextus Aelius Paetus Catus, Consul 198 B. C.), had already composed a work, called the 'commentaria tripertita,' in which the author, not confining himself to a mere collection of formulae, offered a commentary on the Twelve Tables and the formulae for actions and juristic acts. It represents the first attempt to set forth the pontifical jus civile in a literary form, in the form, it is true, of mere explanatory or exegetic notes, but nevertheless a book—the first book dealing with law, the 'cradle of juristic literature' [1b]. From this time onward the technical knowledge of law passed more and more out of the hands of the pontifices and became an ingredient in national culture [2]. At the same time the influence of Greek literature, and, more especially, the scientific methods of the Stoic philosophy, operated as a powerful and ennobling stimulant. The idea now suggested itself of casting the hard materials of law into

civile found definitive expression in the decemviral legislation was, in itself, a popular act, because it was thereby *publicly* ascertained what the existing law actually was.

[1b] Pomponius, l. 2. § 38 D. 1, 2: qui liber veluti cunabula juris continet. Cp. Jörs, *loc. cit.* p. 104 ff.

[2] Qu. Mucius Scaevola (whom we shall presently have occasion to mention) once declared to the orator Servius Sulpicius who consulted him on a legal question: 'turpe esse patricio et nobili et causas oranti jus in quo versaretur ignorare.'

a suitable artistic form. Thus, at an early date, we find M. Porcius Cato, the younger (who died 152 B.C.), making a conscious attempt to work out general principles of law (regulae juris)[2a], i.e. to trace in the raw material of legal rules, as presented by history, the underlying legal idea, to shape the statue from the rough block of marble. The most distinguished of all these 'veteres' was Qu. Mucius Scaevola, the younger, pontifex maximus. About 100 B.C. he wrote his great treatise on the jus civile, in eighteen books, a work of wide and enduring fame. In this treatise the positive private law was, for the first time, set forth in systematic order, i.e. arranged and classified according to *the nature of the subjects* dealt with. Scaevola's system remained the foundation for the subsequent labours of his successors. He abandoned the traditional legal arrangement, and with it the method of merely interpreting the words of statutes or of formulae relating to procedure or juristic acts. Nor did he confine himself to the discussion of isolated cases or questions of law. He arranged his work according to the subject-matter with which the several rules of law are concerned, and in which they are, so to speak, focussed. He was the first to determine, in clear outline, the nature of the legal institutions (will, legacy, guardianship, partnership, sale, hiring, &c.), and the various kinds (genera) thereof. He made the first attempt to set out general legal conceptions, i. e. those elements which go to make up the checkered and, to all appearances, boundless mass of concrete facts. This is the secret of the great significance and enormous success of his work. His achievements rendered it possible, for the first time, to survey private law rising as a whole beyond all the complexities of detail. A mere knowledge of law was beginning to develop into a legal science[2b]. § 15.

L. 2 § 6. 7 D. de orig. jur. (1, 2) (POMPONIUS): Omnium tamen harum (legum XII tab.) et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur,

[2a] e. g. the 'regula Catoniana': quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocumque decesserit, non valere. l. 1 pr. D. de reg. Caton. (34. 7); Jörs, *loc. cit.* p. 289 ff.

[2b] On Scaevola's jurisprudence, v. Krüger, *G. d. Quellen des Röm. R.*, pp. 59. 60; Burckhardt, *ZS. der Sav. St.*, vol. ix. p. 286 ff.

§ 15. quis quoquo anno praeesset privatis.—Postea cum Appius Claudius proposuisset et ad formam redegisset has actiones, Gnaeus Flavius scriba ejus, libertini filius, subreptum librum populo tradidit, et adeo gratum fuit id munus populo, ut tribunus plebis fieret et senator et aedilis curulis. Hic liber, qui actiones continet, appellatur jus civile Flavianum. — — augescente civitate, quia deerant quaedam genera agendi, non post multum temporis spatium Sextus Aelius alias actiones composuit et librum populo dedit, qui appellatur jus Aelianum.

§ 35 eod.: ex omnibus, qui scientiam (juris civilis) nancti sunt, ante Tiberium Coruncanium publice professum neminem traditur: ceteri autem ad hunc vel in latenti jus civile retinere cogitabant solumque consultatoribus vacare potius quam discere volentibus se praestabant.

§ 41 eod.: Quintus Mucius (Scaevola), Publii filius, pontifex maximus, jus civile primus constituit generatim, in libros decem et octo redigendo.

The chief business of a Roman jurist—apart from the drawing up of formulae for juristic transactions (cavere)—was to give answers to legal questions (respondere). With this he would combine the practice of teaching law and writing on legal subjects.

The authority of the ancient pontifical responsa rested on the position occupied by the college of pontifices, which appointed one of its members every year to give 'opinions' on questions of private law (constituebatur, quis quoquo anno praeesset privatis). This is the reason why the judges were, as a matter of fact, bound by the pontifical responsa[3]. Since the close of the republic, however, and with the spread of juristic learning, it had become a frequent practice for persons other than members of the college of pontifices freely to give 'responsa,' though, of course, such responsa were devoid of binding authority. It was clear that such a practice must tend to prejudice the prestige of the responsa and of jurisprudence

[3] The delivery of the pontifical responsum virtually decided the suit, though the pronouncement of the verdict by the judge had to follow as a matter of form. Cp. Mommsen, *Röm. Staatsrecht*, vol. ii. (3rd ed.) pp. 46, 48.

in general. On the other hand, a return to the old monopoly of all legal learning by the pontifices was out of the question. The Emperor Augustus therefore devised a different remedy. With a view to restoring the authority of professional legal opinions, and at the same time, very probably, to throwing the imperial power into fresh relief, he ordered that in future all responsa should be given ex auctoritate ejus (principis)[4], i. e. with the sanction of the emperor. As Augustus was at the same time pontifex maximus, this ordinance of his might be interpreted as involving both a revival and a reform of the old authoritative responsa, which the rise of the new practice had not, of course, done away with. Through the medium of the emperor, it was now feasible for persons who were not pontifices to deliver *authoritative* responsa. Henceforward the pontifical college ceases to play any part in the development of the civil law, and the princeps together with scientific jurisprudence (which has now definitely passed into the hands of laymen) become the prominent agents in the further development. § 15.

From the reign of Tiberius onward the business of giving responsa ex auctoritate principis was invariably carried on in a form which that emperor seems to have been the first to settle definitely. Henceforward it is the usual practice for the emperor to confer the so-called 'jus respondendi' (jus publice, populo respondendi) on certain distinguished jurists. The jus respondendi is the privilege of delivering 'opinions' *binding on the judge*, both on the magistrate and the appointed judex privatus. The 'opinion' of a privileged jurist was required to be delivered in writing and sealed, and if a party submitted such an opinion, in due form, the judge was bound to decide accordingly, unless, indeed, a conflicting opinion of another privileged jurist were also submitted. At first it was only the responsum expressly delivered by the jurist in reference to a particular action that possessed such authoritative force. But it soon became the practice to extend the same authority to previous responsa, i. e. to such as no longer existed in their official form (written and sealed), but were only to be found in the literature

[4] Literally, 'under the guarantee of the emperor.' Cp. Pernice in the *Juristische Abhandlungen*, Festgabe für Beseler (Berlin, 1885), p. 70.

§ 15. of the responsa (the collections of responsa). A rescript of the Emperor Hadrian expressly sanctioned this practice.

The responsa prudentium, i.e. the 'opinions' of the privileged jurists, had become a kind of source of law, and their force, as a source of law, was beginning to extend to juristic literature in general.

> L. 2 § 48. 49 D. de orig. jur. (1, 2) (Pomponius): Massurius Sabinus in equestri ordine fuit et publice primus respondit: posteaque hoc coepit beneficium dari, a Tiberio Caesare hoc tamen illi concessum erat. Et, ut obiter sciamus, ante tempora Augusti publice respondendi jus non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant: neque responsa utique signata dabant, sed plerumque judicibus ipsi scribebant, aut testabantur, qui illos consulebant. Primus divus Augustus, ut major juris auctoritas haberetur, constituit, ut ex auctoritate ejus responderent: et ex illo tempore peti hoc pro beneficio coepit.
>
> Gaj. Inst. I § 7: Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est jura condere. Quorum omnium si in unum sententiae concurrunt, id quod ita sentiunt legis vicem obtinet; si vero dissentiunt, judici licet quam velit sententiam sequi; idque rescripto divi Hadriani significatur.

Roman jurisprudence was thus placed in a position of commanding influence. It only remained to be seen whether it would be able to utilize the influence it had acquired [5].

At the outset, a conflict arose between the jurists themselves. Two rival law-schools sprang up, the Sabinians and Proculians, the Sabinians being the followers of C. Atejus Capito, the Proculians the followers of M. Antistius Labeo. Both Capito and Labeo lived under Augustus. The Sabinians derived their name from Masurius Sabinus, an adherent of Capito, who lived in the reign of

[5] On the subject under discussion, v. especially A. Pernice, *Marcus Antistius Labeo, das römische Privatrecht im ersten Jahrhunderte der Kaiserzeit*, vol. i. (1873), pp. 14 ff., 81 ff.; Karlowa, *Röm. RG.*, vol. i. pp. 657 ff., 677 ff., 707 ff., 733 ff.; Krüger, *G. der Quellen u. Litteratur des Röm. R.* (1888), pp. 109 ff., 126 ff.

Tiberius. The Proculians derived their name from Proculus, who lived in the reign of Nero and was acknowledged as the leader of the disciples of Labeo. The successors of Sabinus and Proculus were C. Cassius Longinus and Pegasus respectively, and it is after them that the Sabinians are sometimes called Cassiani, and the Proculians Pegasiani. § 15.

It is impossible, at the present day, to determine, with any certainty, what the essence of this divergence of schools was. But there would seem to be good warrant for one statement, at least, viz. that the influence exercised by Labeo extended in a large measure to the Sabinians. Of the two great jurists of the Augustan age Labeo was beyond doubt the greater. The large number of quotations from his works which our Corpus juris has preserved bear testimony, to this day, to his extraordinary influence on scientific jurisprudence. Capito's name, on the other hand, has practically disappeared from Justinian's collection. Labeo is the author of various new classifications, divisions and definitions—e. g. the definition of 'dolus malus,' of excusable error, of appurtenances, &c. —which helped to place both the theory and practice of law on a clearer and firmer footing. He is probably the author of the division of all actions into 'actiones in rem' and 'actiones in personam' (inf. § 39)—a division which, to this day, affects all juristic thought in matters of private law. As in the domain of scholarship—for he was an accomplished scholar and thoroughly imbued with the Greek and Roman culture of his age—so also in that of jurisprudence, he was an 'analogist[6],' i. e. his method was to trace all that was normal, all that was united by a common underlying conception, in order that, by so doing, he might bring positive law under the control of the art of dialectics. He was well qualified, therefore, to perform a useful task in his time. For there were many principles of law floating, as it were, in the air, generally recognized and already universally adopted, but still, maybe, waiting for some one to give them direct utterance. Labeo

[6] Cp. M. Schanz in the *Philologus* (1883), p. 309 ff.: *Analogisten u. Anomalisten im römischen Recht.* The author dwells on Labeo's method of dealing with questions of scholarship, and very happily points to certain conclusions to which it helps us in endeavouring to characterize Labeo's intellectual disposition.

§ 15. was the man to grasp them boldly and firmly, to cast them into shape, to give them a terse and vigorous expression which was sometimes, perhaps, too terse, because too sweeping. There was a book of Labeo's in which he had collected what he called the 'probabilia,' i. e. a number of such 'legal principles of universal validity' taken from practical life ('libri pithanon'). This book long continued to exercise a vast practical influence, and it was with a view to softening the exaggerated point of the principles thus formulated that Paulus, as late as two centuries after, wrote a critical commentary on Labeo's work, testing his principles in the light of the actual facts of particular cases, and more especially in the light of the concrete intention of the parties (the 'quod actum est'). But it was precisely the vigour and audacity of his definitions and principles that very naturally carried his contemporaries away. The power of definiteness and logical precision were on his side and could not fail to ensure his success. Neither he nor Capito seem to have founded a regular school themselves. They both gave legal instruction, but apparently after the traditional republican fashion of old distinguished Romans, whose practice it was to give public answers to questions in the presence of their pupils, occasionally arguing with them, but very rarely imparting regular private tuition in a series of connected lectures. Sabinus, who (we are told) earned his living by giving legal instruction[7], seems to have been the first to originate a school of law. It is probable that, at the same time, the method of instruction by means of a corporate organization, such as had been in vogue among the Greek schools of philosophy, found its way into Rome. These schools were societies of which the professor was the president and the pupils the members, each pupil being bound on entering to pay a subscription. The presidency of the school passed by a legal succession from one professor to the other[8]. In opposition to the school

[7] L. 2. § 50 D. de orig. juris (1, 2) (POMPONIUS): huic (Sabino) nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustentatus est.

[8] von Wilamowitz-Möllendorff has proved in his *Philologische Untersuchungen* (edited with Kiessling), vol. iv. (1881) p. 263 ff., that the Greek schools of philosophy were thus organized as corporate societies. Cp. Diels in *Philosophische Aufsätze*, Ed. Zeller gewidmet, 1887, p. 239 ff.. When the students took

of Sabinus, a second school sprang up, organized after the same fashion. This was the school of Proculus. After their respective founders the members of the former called themselves Sabinians, those of the latter Proculians. Tradition subsequently traced back the opposition between the schools to the opposition between the two famous jurists of the age of Augustus, Labeo and Capito. Nevertheless there were many eminent jurists who did not belong to either school and who had learned law in the old fashion, i. e. as 'auditores' of some distinguished jurist. But as long as the opposition between them lasted, the organized societies of Sabinus and Proculus were the natural centres of all further development. Sabinus himself was the leading spirit among the chiefs of these schools. He pointed out to his pupils the lines on which Roman law should progress, in the sense of ridding itself of old-fashioned formalism. The Proculians, on the other hand, were inclined to abide by traditional rules, though, in so doing, they often, perhaps, sacrificed the spirit to the letter of Labeo's, their master's, teachings. The

§ 15.

their meals together, they were bound to conform to the *νόμοι συμποτικοί* or 'drinking rules' laid down by the professor as president of the society. Cp. Pernice, *ZS. der Sav. St.*, vol. vii. rom. Abt., p. 22. The circumstances which seem to point to the conclusion that the Sabinian and Proculian schools were similarly organized as corporate societies are the following. Firstly, the fact that Sabinus was in the habit of taking fees from his pupils; secondly, the circumstance pointed out, some time ago, by Bremer in his *Rechtslehrer und Rechtsschulen im römischen Kaiserreich* (1868), p. 68 ff, viz. that Pomponius (l. 2. § 51 ff. D. 1, 2), in enumerating the heads of the Sabinian and Proculian schools, invariably uses the term 'successit,' which he avoids in enumerating the jurists of the republic—an expression which would seem to show that, in the case of the Sabinians and Proculians, it was really a question of legal succession to the presidency of the school. Again, the words used by Ulpian in l. 1. § 5 D. de extraord. cogn. (50, 13) in regard to the fee payable to the professor, honor, qui in ingressu *sacramenti* offerri debuit (cp. on this point Bremer, *Rechtslehrer*, pp. 5, 6: Karlowa, *Röm. RG.*, vol. i. p. 673, note 1), might contain a reference to such an organization. For sacramentum is the translation in Low Latin (e. g. in the Latin church fathers) for the Greek *μυστήριον*, and the 'mysteries' were private corporations, just as, conversely, the private corporations bore this resemblance to the 'mysteries' that they invariably centred in some religious element. An entrance fee was exacted from every one becoming a member of a mystery or of any private corporation in general. Ulpian's words may, of course, only be meant in a figurative sense for the purpose merely of comparing the fee with the payment made on 'entering the association' (the 'secret society'). But they would still be of interest in reference to the question under discussion as showing how readily—even at Ulpian's time—a comparison between a law-school and a corporate society suggested itself.

§ 15. following dispute may serve to illustrate the difference between the schools. The Sabinians maintained that the defendant in an action was entitled to an acquittal, even though he only gave satisfaction to the plaintiff *during* the trial ('*omnia* judicia esse absolutoria'). The Proculians, on the other hand, insisted that in the actiones stricti juris. i. e. in those actions where the issue submitted to the judge was simply whether or no the defendant was liable, he (the defendant) ought, in all cases, to be condemned, if he was liable at the time when the issue was formulated (litis contestatio), and that no payment by him, *after* litis contestatio, could affect the result. Sabinus' most important work—the one through which he exercised the most lasting influence—was his treatise called 'libri tres juris civilis.' Starting from the law of inheritance and passing on to the several juristic acts, he exhibited the entire body of civil law, classified according to subjects, and succeeded, like Labeo—whose influence he too felt, though in some points he controverted his teachings—in bringing out a number of new points of view, so much so, that his work was adopted henceforward as a fundamental treatise for the study of the jus civile.

The first indications of the so-called 'classical jurisprudence' appeared early in the second century. Its task was to reconcile the opposition between the two schools, and its labours resulted in the fusion of the jus civile and the jus honorarium (which latter had already become stationary) with the new imperial law into one harmonious whole. The foundations were laid by P. Juventius Celsus in his 'Digesta' (in thirty-nine books). He was a follower of Proculus and died probably in the reign of Hadrian. Celsus was succeeded by a more eminent lawyer of the Sabinian school, Salvius Julianus, a native of Hadrumetum in the Roman province of Africa, who flourished under the reigns of Hadrian and Antoninus Pius. The task of his life consisted, in the first place, in the final consolidation of the edictal law (sup. p. 56); and, secondly, in the composition of his great Digest in ninety books. Like Celsus, he adopted the arrangement of the praetorian edict, utilizing it, however, for the purpose of expounding *the whole* of Roman law. His vast acquaintance with practical case-law, the ingenuity of his own

countless decisions, his genius for bringing out, in each separate case, the general rule of law which, tersely and pithily put, strikes the mind with all the force of a brilliant aphorism and sheds its light over the whole subject around—these are the features which constitute the power of his work. Roman jurisprudence had completed its dialectic training under Labeo and Sabinus, and the time had now arrived for applying to the vast mass of materials the principles, categories and points of view that had been thus worked out. Julianus' Digest exhibited Roman jurisprudence in all its strength[9], and its success was proportionately great. Surrounded as he was by numerous friends, all working towards one and the same end, the great jurist's triumph was ensured. Of such fellow-workers we may mention two: one, Sextus Caecilius Africanus, a rugged and weighty writer, the other Sextus Pomponius, a man of extensive reading and learning, who was also interested in historical research. After this, the star of the Proculian school began to set. The jurist Gajus, who died after 180 A.D., and whose institutional treatise was adopted as a model by all subsequent writers of legal text-books, is the last in whom the opposition between the schools is represented. He himself was a Sabinian. He still mentions contemporary teachers 'of the other school,' i. e. Proculians. But their names have not been handed down to us. The Sabinians gained the day. From the time of Salvius Julianus, and as a consequence of his labours, there was but one jurisprudence, and the lines on which it was progressing were those marked out by him. § 15.

The real nature of the task, to fulfil which was the function of Roman jurisprudence, had now become manifest. To unfold the great legal system in all its wealth and multiplicity by means of decisions and opinions, while following up in its details each question that arose, and yet, at the same time, to produce order out of chaos by vindicating the force of firm principles—such was the problem which Roman jurisprudence had to solve. A kind of casuistry of a higher order was required, such as had already been exhibited to the Romans in the great Digest of Celsus, and more especially of

[9] On Julianus and his writings, cp. the recent work of H. Buhl, *Salvius Julianus*, part i. (1886). On p. 108 ff. he deals with the aphoristic wisdom of Julianus.

§ 15. Julianus. At this point—it was towards the end of the second century—the Greek-speaking Orient sent its intellectual forces to participate in the creation of a jurisprudence for the whole empire, emphasizing thereby the consciousness of a great internal unity to which the empire had already attained[10]. Under Marcus Aurelius and Commodus, Q. Cervidius Scaevola, a Greek by birth and subsequently a member of Marcus Aurelius' council of state (consilium), wrote his Digest in forty books, in which he set forth Roman law after the casuistic method, in the shape of 'responsa,' adopting, like others, the arrangement of the edict. His pupils were Septimius Severus, who afterwards became emperor, and, above all, Aemilius Papinianus, the most illustrious and, with Julianus, the greatest of Roman jurists. Papinian, who, like Scaevola, was an Oriental, combined the moral weight attaching to a character of sterling rectitude with the elegance of a Greek and the terseness and precision of a Roman. Like Scaevola he adopted the casuistic method of expounding the law by means of answers to concrete legal cases. He carried this method to its highest perfection. His most important works were eighteen 'libri responsorum' and thirty-seven 'quaestionum libri,' in the latter of which he follows the arrangement of the edict. A mass of detached questions is here treated with the utmost lucidity; the decisions are formulated with great breadth, but, at the same time, with due regard to their proper limitations; the essential facts of each case are thrown into sharp relief and their accordance with the legal principle propounded is so strikingly brought out as to carry conviction, even where no arguments are adduced. Greek and Roman culture, acting and reacting on one another, produced in Papinian the brightest luminary of Roman jurisprudence. What he had taught and demanded throughout his life, viz. that what was immoral should also be thought impossible, he sealed with his death. He was murdered by the servants of Caracalla in 212 A. D. on account of the unswerving resistance which he opposed to the fratricidal designs of that tyrant.

After Papinian the period of decline begins. Roman juris-

[10] Caracalla gave expression to this fact by extending the Roman franchise to provincials; inf. § 22.

prudence had accomplished its masterpiece. The era of creative genius is followed by the labours of the compilers. Papinian's pupil, Domitius Ulpianus, a Syrian by descent (he was a native of Tyre), summed up the results achieved by his predecessors in a critical spirit, and embodied them in his voluminous commentary on the praetorian edict in eighty-three books, in his fifty-one 'libri ad Sabinum,' and in a long series of monographs—most of his works dating from the reign of Caracalla (212–217 A.D.). Next to him, and working in a kindred spirit, we have the jurist Julius Paulus, like Ulpian, an unusually prolific writer and probably a pupil of Scaevola's. His principal works were also a commentary on the edict (in eighty books), and a commentary ad Sabinum (in sixteen books). From this time onward it was in the main through the medium of Ulpian's and Paulus' writings that the labours of the great jurists operated on subsequent ages. The immense intellectua achievements of Roman jurisprudence were there put together in a clear and easily intelligible form. The foundations of Justinian's Digest were thus laid. A touch of the bright Greek spirit illumined the writings of Ulpian and caused them to be preferred to those of Paulus, where the thought is perhaps occasionally more profound, but the struggle with the matter more apparent. Ulpian's writings form the groundwork of Justinian's Digest. They constitute one third, Paulus' writings about one sixth of the Digest (viz. 2462 passages from Ulpian, 2080 from Paulus), so that about one half of that part of our Corpus juris which consists of the Digest owes its origin to the writings of Ulpian and Paulus. After Ulpian only one other jurist, Herennius Modestinus, a pupil of Ulpian's and, like him, a native of the Greek portion of the empire, attained to eminence. Little, however, had been left for him to do. His favourite topics are the law relating to the public officials of the incipient monarchy, and certain subtle questions of theory and practice. It was soon after his time that Roman jurisprudence lost its leading position. The jus respondendi ceased to be conferred after the close of the third century. The emperor alone gave 'responsa,' in the form of the 'rescripta principis' (inf. § 16), and the last achievement of Roman jurisprudence—for its vitality had

§ 15.

§ 15. not yet passed away—was to infuse its spirit into the numerous rescripts of Diocletian and his successors[11].

From Labeo and Sabinus down to Celsus and Julianus, i. e. during the first century of the empire, the development of Roman jurisprudence had been steadily progressive. From Celsus and Julianus to Scaevola and Papinian, i. e. during the second century, it stood at the height of its power. From the time of Ulpian and Paulus, i. e. from the third century onwards, a period of uninterrupted decline set in. The treasure of Roman jurisprudence lay henceforth in the wealth which the past had produced. And a wonderful treasure it was which was thus entrusted to the safe-keeping of the jurists, and which they now passed on to the emperors and, through them, to the coming generations.

The task which had devolved upon Roman jurisprudence, and which it had now solved, had been a twofold one, viz. firstly, to consolidate into a uniform system the law which lay stored up in all the manifold sources, from the time of the Twelve Tables downwards; secondly, to develop, in a scientific form, the abundance of matter which these sources of law contained. The time had arrived for a new interpretatio. Just as, at an earlier date, the Twelve Tables had to be 'interpreted,' so now, it was above all things the praetorian edict that had to be subjected to a similar process. It was only in a rough and ready manner, in a few broad outlines, that the praetorian edict had been able to work out the principles of a free and equitable law for the mutual dealings of man and man. There was a large field for further labour here. Nay, what is more, there were a great many subjects on which no information whatever was to be gained either from the praetorian edict or any other written source of law, for example, on the principles of representation, on the legal effect of conditions, on the contractual liability for negligence and many others. The problem here was to discover the true nature of the dealings themselves, to trace the *unexpressed* and *unconscious intention* underlying all such dealings, and, having done so, to

[11] Cp. F. Hofmann, *Kritische Studien zum römischen Rechte* (1885), pp. 3–35: *Der Verfall der Röm. RW.*; Krüger, *G. der Quellen*, &c., p. 274. Nevertheless it would seem that instances of grants of the jus respondendi occurred even under Diocletian (Krüger, p. 260, n. 6).

put it into words, to clothe it in a form in which definiteness and lucidity should be coupled with a degree of comprehensiveness sufficient to bring out the broad general principle governing, not merely a large number of cases, but positively *all* cases, including those which were peculiar and exceptional. Such a problem touched rather the creation than the application of law. But it was precisely in performing a task of this kind that the genius of Roman jurisprudence came most strikingly into play. In spite of its innate dialectic strength and discipline, it had but few dogmatic interests in the modern scientific sense of the term. It gave little thought to the abstract conception of law, of ownership, or of liability; and what little it gave, generally yielded but very scanty results. But with regard to the consequences involved in the abstract conception of ownership or of liability, its natural instinct was never at fault for a single moment. And nowhere was this unique power more conspicuously displayed than in the way the Roman jurists, so to speak, hit upon the precise requirements of bona fides in human dealings and applied them to individual cases. In such transactions, for instance, as sales, agreements to let and hire, agencies, &c. they seemed to know at once, and instinctively, what it was that the nature of the circumstances themselves required, in all cases and in each separate case, quite apart from any explicit declaration of intention on the part of the persons concerned. It is this wonderful discrimination, this clear-sightedness in the adjustment of conflicting principles, guided by a never-failing power of discerning the common elements; this unique faculty for giving outward expression to the law inherent in the concrete circumstances, which law, when found, supplies the rule—with many practical variations of course—for all other circumstances of the same kind:—these are the features to which the writings of the Roman jurists owe their incomparable charm, and the work they have achieved its indestructible force. It was no mere 'arithmetic of abstractions,' as it has been called, that made the Roman jurists as great as they were, it was rather that practical tact, which, without always being intellectually conscious of the abstract conception, nevertheless invariably acted in accordance with it, and thus succeeded in bringing out, in

§ 15.

§ 15. the individual case, the general law inherent in all cases of a similar description.

The department of law where the peculiar genius of the Roman jurists found full scope, is the law of obligations, the law of debtor and creditor, the law, in other words, which is most properly concerned with the mutual dealings between man and man; and here again it is more especially the law relating to those contracts, where not merely the expressed, but also the unexpressed intention of the parties has to be taken into account (the so-called negotia bonae fidei). And in regard to this unexpressed intention which is not, for the greater part, present to the mind of the party himself at the moment of concluding the contract, it was the Roman jurists who discovered it, and discovered it for all times to come, and enunciated the laws which result from its existence. This is a task which will never have to be done over again. And, at the same time, they clothed these laws in a form which will remain a model for all future ages. This is the reason why the law of obligations, and it alone,—and more particularly the law of those negotia bonae fidei, and it alone—constitutes what is, in the truest and strictest sense, the imperishable portion of Roman law. As to the remaining parts of Roman private law, they never again attained to complete and absolute dominion, and are all on the point of being, more or less, superseded and even formally abrogated by the coming civil code of Germany. But the Roman law of obligations will endure. It cannot be abolished. The intention of the purchaser and hirer, &c. is the same in all ages, and it is this intention alone that Roman law has made clear. The legislation of Germany may indeed repeal the Roman law on this subject, in point of fact, however, it cannot fail to be a substantial re-enactment of it.

It was just the manner in which the Roman jurists exercised their vocation that enabled them to accomplish these striking results and to secure to Roman law its imperishable and irresistible power. For the centre and pivot of all their learning lay at all times in the art of giving 'responsa,' i. e. in the treatment of concrete cases. Roman jurisprudence grew up in immediate contact with practical life, immersed, so to speak, in a multitude of concrete cases, but

§ 15. never at a loss to discover the law inherent in each,—a law which, though abstract, met the requirements of details and which, with all its elasticity, was strong and firm enough to govern the vast field of human dealings with triumphant certitude.

The praetorian law was the channel through which the jus gentium had, in the first instance, gained admittance to, and had then rapidly permeated, Roman law. But it was only in the hands of the Roman jurists that the jus gentium, that law of human dealings which, in itself, was so intangible, so shifting and so free, received the tangibleness, the perspicuity and, at the same time, the necessary limitations without which the principles of bona fides, in the form in which the Roman jurists had embodied them, could never have retained their indestructible vitality.

The real task which had devolved on Roman law in its course of development was thus accomplished. The jural reason inherent in the various relations of human intercourse had found an expression of classic beauty in the writings of the Roman jurists. The last touch was all that was wanting. To apply it was reserved for the imperial power.

L. 2 § 47 D. de O. J. (1, 2) (POMPONIUS): Maximae auctoritatis fuerunt Atejus Capito, qui Ofilium secutus est, et Antistius Labeo, qui omnes hos audivit, institutus est autem a Trebatio. Ex his Atejus consul fuit: Labeo noluit, cum offerretur ei ab Augusto consulatus, quo suffectus fieret, honorem suscipere, sed plurimum studiis operam dedit, et totum annum ita diviserat, ut Romae sex mensibus cum studiosis esset, sex mensibus secederet et conscribendis libris operam daret; itaque reliquit quadringenta volumina, ex quibus plurima inter manus versantur. Hi duo primum veluti diversas sectas fecerunt: nam Atejus Capito in his, quae ei tradita fuerant, perseverabat; Labeo ingenii qualitate et fiducia doctrinae, qui et ceteris operis scientiae operam dederat, plurima innovare instituit.

The first book in which a reconstruction, on scientific lines, of the writings of the Roman jurists (more especially from the materials preserved in Justinian's Digest), has been undertaken, is Otto Lenel's *Palingenesia juris civilis*, in many respects a work of fundamental importance.

§ 16. *The Imperial Legislation.*

§ 16. The imperial power passed through two stages of development. In its first stage, that of the principatus[1], the power of the emperor is simply the power of the 'first citizen' of the republic; in its second stage, i. e. from the time of Diocletian and Constantine, it is the power of a monarch. This development is reflected in the history of law. The princeps of the first epoch has no legislative powers, but the imperial monarch of the fourth and subsequent centuries has legislative powers. During the period of the principate the emperor's influence on the development of the law is merely incidental and supplementary, whereas during the period of the monarchy he assumes, by means of his legislative authority, the exclusive leadership in all further legal progress.

1. First Stage.

During the first stage, which extends down to about 300 A. D., the princeps influences the development of law in four ways: by his decisions of particular cases (decreta, interlocutiones); by his 'opinions' on particular cases (rescripta); by his instructions to officials (mandata); by his public ordinances (edicta).

'Decreta' and 'Rescripta' must be regarded as means of authentic interpretation. The emperor interprets the law by applying it to a particular case, but the imperial interpretation of law is authoritative, and conclusive for all cases of the same kind. A rescript was granted in reply to an enquiry addressed to the emperor either by a magistrate or—as was far more frequently the case—by a private party. It took the form either of an independent reply (epistola) or of a note appended, by way of answer, to the petition (subscriptio). The quasi-statutory force of decrees and rescripts (legis vicem habent), like that of the responsa prudentium (§ 15), is

[1] The princeps, as such, is a private individual, distinguished, however, from other private individuals by the fact that he possessed firstly the tribunicia potestas for life, which secured him a decisive influence in the city of Rome, and secondly the imperium for life, which made him military commander-in-chief in the empire. Cp. A. Nissen, *Beiträge zum röm. Staatsrecht* (1885), p. 209 ff. Mommsen (*Staatsrecht*, vol. ii. p. 723 ff.) takes a somewhat different view and holds that the power of the princeps was, on principle, magisterial.

not limited to the life of the emperor who issues them. The authentic interpretation shares the legal force of the law it interprets[2]. § 16.

The 'Mandata' which the emperor addressed to his officials became, as a matter of fact, a source of law in so far as certain portions of them (capita ex mandatis) were regularly repeated in every set of official instructions[3]. The imperial 'Edicts' were the outcome of that right to issue public orders which vested in the emperor in his magisterial capacity. By means of his edicts on questions of private law he made known the principles by which he intended, in such cases, to be guided in the exercise of his imperial power[4]. Edicts and mandates were only valid, on principle, during the life of the emperor who issued them; if their validity was to extend any further, the next emperor had to repeat them[5].

The jurists gave these various manifestations of the imperial power, so far as they bore on the development of law, the collective name of 'constitutiones,' and assigned to such constitutiones a quasi-statutory force in so far as the conditions of permanent validity had been satisfied, which (as we have seen) was not a matter of course in the case of edicts and mandates. During this epoch, however, a law proper did not ordinarily take the form of an imperial ordinance, nor again of a popular statute—which latter occurred only very exceptionally, and only in the early part of this period—but the form of a senatusconsultum. During the republic, the authority of the senate was still confined to regulating

[2] e. g. the decretum divi Marci on self-help, l. 7 D. ad leg. Juliam de vi privata (48, 7), the epistola divi Hadriani on the beneficium divisionis for several co-sureties, § 4 I. de fidejuss. (3, 20), l. 26 D. eod. (46, 1). — Cp. Mommsen, *Staatsrecht*, vol. ii. p. 873 ff.; Karlowa, *Röm. RG.*, vol. i. p. 646 ff.; Krüger, *G. d. Quellen*, p. 93 ff. It was not till Hadrian (sup. p. 57, n. 14) that it became the practice for the emperor to give a legal opinion in reply to the petition of a *litigant party*. Altogether the reign of that emperor marks a perceptible advance from the principate of the old style to the later monarchy. Cp. Bremer, in the *Göttinger Gelehrte Anzeigen*, 1889, p. 429 ff.

[3] e. g. the caput ex mandatis in favour of soldiers' wills, which became a standing order from the time of Hadrian, l. 1 pr. D. de testam. militis (29, 1).

[4] e. g. l. 4 D. ne de statu defunct. (40, 15): Divus Nerva edicto vetuit post quinquennium mortis cujusque de statu quaeri.

[5] Mommsen, *Röm. Staatsrecht*, vol. ii. (2nd ed.) pp. 867, 868, 875, 876. Hence it was very rarely that the emperors resorted to edicts for the purpose of introducing rules of law which were intended to be permanent.

§ 16. the *execution* of the laws by means of an authoritative interpretation. From the beginning of the empire, however, though at first, in the face of some opposition (Gaj. 1, 4), the senate exercised an independent legislative power operating, of its own force, as a source of jus civile. The decree of the senate was now regarded as taking the place of the popular statute. The princeps has the right to treat with the senate and to originate a decree of the senate by means of a motion (oratio); since Hadrian, in fact, the power to submit bills to the senate for the purpose of having them enacted as senatusconsulta is exclusively exercised by the emperor. To what extent the right of the senate to agree to a motion of the emperor's had, in the course of this epoch, sunk to a mere matter of form, is apparent from the fact that it could become the practice, at a subsequent date, to quote, not the senatusconsultum, but merely the oratio, i. e. the motion of the emperor [6].

> Gaj. Inst. I § 4: Senatusconsultum est, quod senatus jubet atque constituit, idque legis vicem optinet, quamvis fuerit quaesitum. § 5: Constitutio principis est, quod imperator decreto vel edicto vel epistula constituit, nec umquam dubitatum est, quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat.
>
> L. 1 § 1 D. de const. princ. (1, 4) (Ulpian.): Quodcumque igitur imperator per epistulam et subscriptionem statuit vel cognoscens decrevit vel de plano interlocutus est vel edicto praecepit, legem esse constat. Haec sunt, quas vulgo constitutiones appellamus.

2. Second Stage.

From the close of the third century the power of Roman jurisprudence began to decline. From the same date, i. e. from the reign of Diocletian, the imperial power, which had now definitely become monarchical, commences to exercise an exclusive control over the further development of law. The emperor reserved for himself not merely the right formally to create new law (viz. by legislation), but also the right to interpret the existing law, out of

[6] e. g. the oratio divi Severi on the property of wards, l. 1 D. de reb. eor. (27, 9). Karlowa, *loc. cit.* p. 643 ff.; Krüger, *loc. cit.* p. 83 ff.

which he was thus able in cases of doubt to develop new principles. The imperial opinions (rescripta) took the place of scientific interpretation and consequently increased enormously in number. (We possess over a thousand rescripts of Diocletian's.) In addition to the rescript, we have, as before, the 'decretum' or judicial decision of the emperor, and, above all, the imperial statute, representing the new form in which the development of the law is carried on. The imperial statute originated in the motion which the emperor introduced to the senate (oratio), but the form of communicating it to the senate has now been discarded. Imperial legislation supersedes senatorial legislation. An imperial statute is, so to speak, an 'oratio' directly promulgated to the nation at large. Hence it is described as an 'edictum' or 'lex generalis.' When the emperor had acquired the power to legislate, it became necessary to distinguish his merely interpretative or judicial from his legislative functions. Whereas in the earlier epoch every rescript and decree had possessed the force of general law, unless its validity were expressly limited to the particular case ('constitutio personalis'), the position was now reversed, and every rescript and decree, as such, was treated as a 'constitutio personalis,' i. e. as valid only for the particular case, unless the general validity of the principle applied were expressly ordained. It was only when the emperor chose to act as lawgiver that a law binding on the whole empire ('constitutio generalis') came into existence, and (on principle at least) it was the form which marked and characterized a statute as such. In ordinary cases, then, a law takes the form of an edict, i. e. a law officially promulgated; in extraordinary cases, it takes the form of a rescript or decree (expressly issued with the force of law), i. e. a law not officially promulgated. There are still laws which are not officially promulgated, and which only become known to the people at large through the medium of literature, because the emperor, in legislating, still continues, to some extent, to avail himself of the forms of an earlier period when, formally, he possessed no legislative powers. Nevertheless, the principle of the distinction between a law, as something which requires to be promulgated, and a mere detached decision, as something which

§ 16.

§ 16. needs no promulgating, is already well established; and the decision which is not officially promulgated (the rescript or decree) has only the force of law in exceptional cases. The modern type of monarchical legislation is thus gradually attaining to a consciousness of its own nature and conditions.

> L. 1 C. de leg. (1, 4) (CONSTANTIN.): Inter aequitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere.
>
> L. 12 § 3 eod. (JUSTINIAN. . In praesenti leges condere soli imperatori concessum est, et leges interpretari solum dignum imperio esse oportet.
>
> L. 11 C. Th. de rescr. (1, 2) (ARCADIUS et HONORIUS): Rescripta ad consultationem emissa vel emittenda in futurum iis tantum negotiis opitulentur, quibus effusa dicebantur.
>
> L. 3 § 1 C. de leg: (1, 14) (THEODOS. et VALENTINIAN.): Sed et si generalis lex vocata est (viz. the decision of a single case) vel ad omnes jussa est pertinere, vim obtineat edicti, interlocutionibus, quas in uno negotio judicantes protulimus vel postea proferemus, non in commune praejudicantibus, nec his, quae specialiter quibusdam concessa sunt civitatibus vel provinciis vel corporibus, ad generalitatis observantiam pertinentibus [7].

Imperial legislation which henceforth took the lead in all further progress had a twofold task to fulfil: firstly, to complete the development of Roman law; secondly, to gather in the results.

The completion of the development of Roman law involved, on the one hand, a final process of filing down the jus civile by the jus gentium, and, on the other, the removal of the antithesis between jus civile and jus honorarium. Both these tasks were solved, not by the short and sharp method of codification, but by a series of separate statutes. For the same cautious conservative tendency,

[7] On the same point cp. l. 1 C. eod.; Puchta, *Cursus der Institutionen*, § 131. Justinian, again, enacted that an imperial decree which was announced at a solemn sitting of the court, in the presence of the parties (a form which was observed in certain appeal cases), as well as the authentic interpretation of a 'lex generalis' contained in a rescript or decree, should be presumed to have the force of general law, l. 12 C. de leg. (1, 14). The rule, however, that, on principle, decrees and rescripts should *not* have the force of general law remained untouched.

chary of innovations, which characterizes the history of Roman law in general, is no less characteristic of the methods of imperial legislation. From Diocletian and Constantine to Justinian, i. e. during an interval of over two centuries, the ancient traditional law, the 'jus vetus,' was subjected to a continuous process of polishing and filing at the hands of successive emperors, till perfect unity and harmony had been established. And the majority of final reforms, which effected alterations of a more far-reaching character in the private law, were only accomplished by Justinian, the last Roman emperor whose own proficiency in the law enabled him, in some measure, to dispense with the aid of his legal advisers, and work independently at the improvement of Roman law. Some of his reforms, e. g. in the law of inheritance, were not even carried out till after the completion of the Corpus juris, by means of his Novels. Down to the Corpus juris the Twelve Tables continued in theory to constitute the basis of the entire body of Roman law. Down to the Corpus juris, again, the antithesis between jus civile and jus honorarium continued in theory to be maintained. Justinian's Corpus juris summed up the results of that continuous development which had commenced centuries ago with the Twelve Tables, and the Twelve Tables themselves, with all that followed them, were now superseded by the great imperial code of Justinian. Theoretically speaking, this code signalized the final victory of the jus civile, for the law begotten by imperial legislation was civil law; in point of fact, however, it was the jus gentium, allied with the jus honorarium, that had triumphed all along the line. § 16.

Caracalla had conferred the Roman franchise on all citizens of the empire. There was thus but one nationality in the Roman empire, to wit the Roman—and the Roman nation was coextensive with that portion of mankind upon which the civilization of Western antiquity rested. From the fourth century onwards the tendency to shift the centre of gravity to the Eastern, in other words, to the Greek portion of the empire, became more and more pronounced. Formal expression was thus given to what had already been an accomplished fact: the victory of cosmopolitan Hellenism over the spirit of ancient Rome. It was no longer the

§ 16. traditions of Rome and Italy, but the views and requirements of Greek provincialism that surrounded and influenced the emperor of Constantinople. The provinces had ousted the old premier country, Greece had triumphed over Rome. And so it came to pass that the jus gentium finally displaced the old jus civile. Centuries ago the intercourse with the Greeks had engrafted the jus gentium on the local law of Rome. Now that the native soil of the jus gentium itself had become the scene of legal development, the jus gentium could not fail to put forth all its strength. Thus the jus aequum, having attained to full maturity, received the final form in which it dominated with essential uniformity the whole field of private law. Roman law was finished: the local law of a city had passed into a law available for the world in general.

One thing only remained to be done, and that was to gather in the ripe fruits and store them up for future generations. This task also devolved on the emperors, and was successfully performed by them.

§ 17. *Codification.*

§ 17. I. The Stages preliminary to Codification.

In the later empire (which dates from the fourth century) there were two groups of sources of law: firstly, the 'jus vetus,' or 'jus' simply, i.e. the old traditional law, the development of which was completed in the classical period of Roman jurisprudence (in the course of the second and the beginning of the third century); secondly, the 'leges' or 'jus novum,' i.e. the later law which had sprung from imperial legislation. These two classes of law, 'jus' and 'leges,' mutually supplementing each other, constituted the whole body of law as it existed at the time, and, taken together, represented the result of the whole development of Roman law from the earliest times down to the period we have now reached, viz. the epoch of the later empire.

The 'jus' was based, indeed, on the Twelve Tables, the plebiscita, the senatusconsulta, the praetorian edict and the ordinances of the earlier emperors. In reality, however, neither the tribunals nor the parties were in the habit of using these sources of law, in their

original form, but preferred to resort to the classical juristic literature where they found the results of these sources set forth and worked out. It was not the praetor or the plebiscitum that was now quoted, but Papinian, Ulpian, Paulus, and the other jurists. And, at the same time, no distinction was made as to whether the particular opinion had happened to be conveyed by Paulus or Papinian in the shape of a 'responsum' or not. The authority which the responsa, and the literature connected therewith (§ 15), had acquired since the opening of the second century was now actually transferred to juristic literature in general. To this must be added the fact that the conferring of the jus respondendi on individual jurists was discontinued in the course of the third century; after Diocletian the emperor was the only person entitled to give authoritative responsa, which he did by means of his rescripts (§ 16). Thus it happened that later ages failed to appreciate the distinction between jurists who had, and jurists who had not, the jus respondendi. The writings of jurists who had not possessed the jus respondendi were cited as entitled to an authority in no way inferior to that of the writings of privileged jurists, provided only they were supported by the same *literary* prestige which distinguished the writings of the illustrious privileged jurists. Thus, for example, in the fourth century, Gajus, who flourished as a professor of law under Antoninus Pius and Marcus Aurelius, and whose writings delighted all subsequent ages by a fluency and lucidity worthy of a Greek, enjoyed, in the courts of law, an authority equal to that, say, of Paulus or Papinian, in spite of the fact that he had never possessed the jus respondendi. Considering that, in the case of the privileged jurists, their other writings which, of course, had nothing to do with their jus respondendi, were ranked on a par with the writings on the responsa, it was altogether absurd to insist on the jus respondendi as a condition of judicial authority. The practice of not discriminating between the different kinds of writings necessarily led to the practice of not discriminating between the authors themselves—which is only another way of saying that the transfer of the authority of the responsa to juristic literature in general had become an accomplished fact. § 17.

§ 17. A keenly-felt want was satisfied by this development. The old sources of law, and more especially the popular statutes and the praetorian edict, had ceased, by this time, to be generally intelligible, partly on account of their language, partly on account of the bald, sententious, pregnant phraseology in which they were couched. Since people were no longer able to make use of the old sources of law themselves, they were driven, in lieu thereof, to resort, on a more extensive scale, to the juristic literature which had sprung from these sources. In other words, 'jus,' i. e. the law of the earlier stages of development, ceased to be practically available in any other form but that in which it appeared in the writings of the jurists; the jus (vetus) became identified with jurist-made law.

All the emperors had to do here was, partly to modify, partly to supplement and confirm the law as they found it. This was done by a number of 'laws of citations,' among which Valentinian the Third's Law of Citations (426 A.D.) is the most important. Valentinian merely sanctioned what had already become an established usage. He enacted that the writings of the jurists, to wit, of Papinian, Paulus, Ulpian, Gajus and Modestinus, as well as of all those who were cited by these writers (the limits of classic literature being thus officially determined) should possess quasi-statutory force so that their opinions should be binding on the judge[1]. If the

[1] The Law of Citations is based on the presupposition that the writings of the above-named five great jurists, Papinian, &c., are widely circulated and generally known. The same does not apply to the writings of the other jurists (Scaevola, Sabinus, &c.) who are mostly older. Hence it is provided that the writings of these other jurists shall only be used, if they—in the words of the enactment—'codicum collatione firmentur.' The meaning of these last words is doubtful. The usual translation, according to which they would mean that the contents of those writings were to be confirmed 'by a comparison of manuscripts,' seems as little accurate as it would be to translate 'codex Theodosianus' by the 'Theodosian manuscript.' 'Codex' does not mean a manuscript, as such, in our modern sense of the term, but a parchment volume, a *book*, more especially a book which contains a variety of things, e. g. the 'codices accepti et expensi' (inf. § 68), or the 'codices' (i. e. the books) of the mathematici in l. 10 C. de episc. aud. (1, 4). In the same way we hear of a 'codex Gregorianus atque Hermogenianus,' i.e. a collection by Gregorianus and Hermogenianus (cp. the gesta de recip. cod. Theod.: ad similitudinem Gregoriani atque Hermogeniani *codicis* cunctas *colligi* constitutiones decernimus); and again of the 'codex Theodosianus' and the two codices of Justinian (to wit, the 'codex juris enucleati,' i. e. the collection of the jurist-made law in the Digest, and the 'codex constitutionum,' cp. const. Deo auctore, § 11). The words in question would accordingly mean that the writings of the jurists other than the specified five must be confirmed by a collation of the 'col-

opinions differed on the same question, that opinion should prevail which was supported by most jurists; if the numbers were equal, Papinian's opinion should prevail, or, if Papinian had expressed no opinion on the question, the judge was to exercise his discretion. Not a word is said about citing the old sources of law themselves; their force as law has passed on to juristic literature. Valentinian the Third's Law of Citations marks the completion, for the time being, of that development which had commenced with the responsa of the old pontifices and the jus respondendi of Augustus. Never did a literary movement achieve a more unqualified success. § 17.

L. 3 C. Th. de resp. prud. (1, 4) (Theodos. et Valentinian.): Papiniani, Paulli, Gaji, Ulpiani atque Modestini scripta universa firmamus ita, ut Gajum quae Paullum, Ulpianum et cunctos comitetur auctoritas, lectionesque ex omni ejus opere recitentur. Eorum quoque scientiam, quorum tractatus atque sententias praedicti omnes suis operibus miscuerunt, ratam esse censemus, ut Scaevolae, Sabini, Juliani atque Marcelli, omniumque, quos illi celebrarunt, si tamen eorum libri propter antiquitatis incertum codicum collatione firmentur. Ubi autem diversae sententiae proferuntur, potior numerus vincat auctorum, vel si numerus aequalis sit, ejus partis praecedat auctoritas, in qua excellentis ingenii vir Papinianus emineat, qui ut singulos vincit, ita cedit duobus.

lections,' i. e. only such passages may be used as have been admitted to the 'collections.' The only possible interpretation would seem to be that it was intended to make collections (codices) of the passages taken from the writings of other jurists, which were to be used in addition to the works of Papinian, &c.—a plan which might be compared with that indicated in c. 5 C. Th. de const. princ. (1, 1) and actually carried out in Justinian's Digest, except that, in the latter, the validity of *all* juristic writings was confined to such excerpts as had been admitted (cp. inf. note 2). Thus the words would mean that quasi-statutory force should attach to all the writings of Papinian, Ulpian, Paulus, Gajus, and Modestinus, but only to certain excerpts from the writings of the remaining jurists cited by Papinian, &c. But since no such collections of excerpts from the works of the remaining jurists were ever made, the practical result was that which found expression in the interpretation of Valentinian's Law of Citations contained in the code of the Visigoths, viz. that of the writings of the other jurists only those passages were valid which had been adopted in the works of the above-named five jurists. As to the different explanations of the Law of Citations, cp. Puchta, *Cursus der Institutionen*, § 134; Danz, *Lehrbuch der G. des Röm. R.* (2nd ed.), § 78; Dernburg, *Die Institutionen des Gajus*, p. 110 ff; Karlowa, *Röm. RG.*, vol. i. pp. 933, 934. The view here set forth has been controverted by Ferrini, *Storia delle fonti di diritto Romano* (Milano, 1885), p. 112 ff; and A. Pernice, *ZS. der Sav. St.*, vol. vii. p. 155.

§ 17. Notas etiam Pauli atque Ulpiani in Papiniani corpus factas (sicut dudum statutum est) praecipimus infirmari [2]. Ubi autem pares eorum sententiae recitantur, quorum par censetur auctoritas, quod sequi debeat, eligat moderatio judicantis. Pauli quoque sententias semper valere praecipimus, &c.

The jus (vetus) was traditionally taken to include those collections of early imperial ordinances, more especially of rescripts, among which the Codex Gregorianus—published about 300 A.D.—and the Codex Hermogenianus—a later collection supplementing the former, and published in the course of the fourth century—were preeminent. Both these codices were perhaps due to suggestions from official quarters [3]. Their practical value lay in the fact that they contained such rescripts (including the numerous rescripts of Diocletian) as the classical jurists had not yet been able to take into account.

The real type of the new imperial law (leges) was the 'edictum,' in the later sense of the term, the 'constitutio generalis' promulgated to the public. All that these constitutions of the new kind as well as the rescripts of the post-classical period required was that they should be collected, and this want was supplied by the Codex Theodosianus, published by the Emperor Theodosius II in 438 A.D., and promulgated in the very same year with statutory force for the

[2] In the year 321 the Emperor Constantine, with a view to cutting short 'perpetuas prudentium contentiones,' had interdicted the use of Ulpian's and Paulus' critical notes to Papinian's works (fragments of which have been recently discovered, cp. *ZS. d. Sav. St.*, vol. ii. p. 86 ff; vol. v. pp. 175 ff, 185 ff); he had, however, ratified the use of Paulus' other writings, especially the 'Sententiae,' which are also expressly mentioned at the end of Valentinian's Law of Citations (cp. text, above), l. 1. 2 C. Th. de resp. prud. (1, 4). It is clear that as early as the beginning of the fourth century, all the writings of the famous jurists, and not merely their responsa, were used in the tribunals, and that the parties were in the habit of bringing into court and submitting to the judge the particular juristic work upon which they relied (l. 2 cit.: in judiciis prolatos). Hence it was that the need for a systematic arrangement of excerpts from the writings of the jurists (cp. note 1) became all the more urgent. Such a collection would make it much easier to show the judge all the passages bearing on the arguments. A private compilation of this kind, dating probably from the end of the fourth century, has been preserved to us—partially at least—in the so-called Fragmenta Vaticana—a collection of excerpts from the jurists (Papinian, Ulpian, Paulus), together with some imperial constitutions, arranged according to their matter. (Cp. Karlowa, *Röm. RG.*, vol. i. p. 969 ff.)

[3] A private collection of rescripts, of an earlier date, existed in the 'libri xx. constitutionum' of Papirius Justus, which were compiled in the second half of the second century. They were also considered as belonging to the 'jus,' and were, for this reason, extracted by Justinian in his Digest (e.g. l. 60 D. de pactis 2, 14).

Western Empire, by Valentinian III. It contained the constitutiones generales issued since Constantine and at the same time abrogated all such constitutions of the same period as had not been adopted. § 17.

Between the Codex Theodosianus and Justinian a series of separate imperial laws were issued, which were known as 'Novels,' and collected under that name (the so-called 'Post-Theodosian Novels').

The following sources of law were thus in use at Justinian's time: 1. the writings of the jurists, as determined by Valentinian's Law of Citations; 2. the earlier imperial ordinances (Codex Gregorianus and Hermogenianus); 3. the Codex Theodosianus and its novels.

These are the materials out of which our Corpus juris was constructed[3a].

II. The Corpus juris of Justinian.

The Emperor Justinian, who reigned from 527–565 A.D., conceived the plan of consolidating the entire existing law in one single code. For this purpose he caused two collections to be prepared, one of the 'jus,' or jurist-made law, the other of the 'leges,' or emperor-made law. A short text-book (the 'institutiones,' or 'Institutes') was prefixed to the whole by way of introduction to the code and the study of law. Thus the code was divided into three parts: the Institutes, the Digest (or Pandects), and the Code.

1. The Institutes.

The Institutes (in four books) are a short text-book of Justinianian law, its contents being partly of an historical, partly of a theoretical character. It was composed by the imperial minister Tribonian, and, under his supervision, by the two professors Theophilus and Dorotheus[4]. It was founded on earlier institutional treatises, e.g.

[3a] The so-called 'Syrio-Roman Book of Law,' which was originally written in Greek, and which has survived to this day in a Syrian (as well as an Armenian and Arabic) translation, dates from the period between the Codex Theodosianus and the code of Justinian. (It has been edited with a translation and notes by Bruns and Sachau, 1880.) It was very extensively used in the East, where it was never superseded by Justinian's Corpus juris, in spite of, or perhaps in consequence of, the comparative crudity of the legal learning which it embodied.

[4] It is probable that Dorotheus wrote the first two books, and the last title of the fourth, Theophilus the last two books except the last title. In point of diction, Dorotheus' manner is rather more Byzantine, that of Theophilus is simpler. Cp. Huschke, Preface to his edition of the *Institutes*, 1868; Ed. Grupe, *De Justiniani Institutionum compositione* (Argentorati, 1884).

§ 17. those of Ulpian and Marcianus, but more especially on the Institutes and Res quotidianae of Gajus. Justinian published the Institutes as part of his code, with the same statutory force as the remaining portions.

Const. IMPERATORIAM (prooem. Inst.) of Nov. 21, 533 A.D., the document officially promulgating the Institutes.

Const. TANTA (l. 2 C. de veteri jure enucl. 1, 17) of Dec. 16, 533 A.D., refers (in §§ 11, 23) to the Institutes, and provides that both the Institutes and the Digest shall have statutory force from Dec. 30 of the same year.

2. The Digest (or Pandects).

The Digest (in fifty books) is a collection of excerpts from the writings of the jurists, in other words, a codification of the 'jus' or jurist-made law, prepared, by Justinian's orders, by a commission of professors and advocates under the supervision of Tribonian. In their arrangement of the subject-matter the compilers were, generally speaking, guided by the order of the praetorian edict. The commission was divided into three sections, each of which was instructed to extract a particular group of writings. To the first section was assigned the group of works dealing with the jus civile, 'the Sabinian group,' so called, because the staple of these works consisted of the writings of Sabinus and his commentators. To the second section was assigned the group of works dealing with the praetorian edict, the so-called 'Edict-group.' To the third section was assigned the group of works dealing with separate legal questions and cases, the 'Papinianian group,' so called, because in this branch the writings of Papinian and his commentators transcended all others in importance. Each section extracted the works allotted to it so far as they bore on each particular subject. Thereupon the whole was consolidated into one work, the extracts of the three groups being pieced together under each rubric, while some extracts from such writings as had, in the first instance, been overlooked or set aside, were subsequently inserted (the so-called 'Appendix-group')[5]. Inasmuch as the object

[5] Bluhme, *ZS. für geschichtliche RW.*, vol. iv. (1820), p. 257 ff.—All those jurists were drawn upon to whose writings Valentinian's Law of Citations had given the force of law, i. e. the writings of the five great jurists and the writings

of the whole undertaking was not to promote historical research, but to produce a practical code of law, the commission was empowered to make alterations in the excerpts they adopted. This is the explanation of the so-called 'interpolations' ('emblemata Triboniani') by means of which the selections from the classical jurists were brought into harmony with the law of Justinian's time[6]. The controversies among the juristic writers were set aside, one view only being accepted —such at least was the intention—in the Digest. All individual features were swept away in favour of a uniform, self-consistent whole[7]. It was but reasonable that Justinian and his advisers should look with pride on their achievement. Their work was, in the main, a success. The results of the development of Roman law extending over more than a thousand years had been summed up. Instead of a wilderness of juristic writings there was a uniform work, easy of survey and methodical in execution. It was forbidden to make any further use of the writings of the jurists in their original form, and the imperial selection—an epitome and, at the same time, a revival of Roman jurisprudence—was published with statutory force. Never had a code been prepared from nobler materials[8].

§ 17.

Const. DEO AUCTORE (at the head of the Corpus juris and in l. 1 C.

of the authorities whom they cite. Paulus' and Ulpian's notes on Papinian (sup. note 2) were restored to validity. The Digest commission was expressly exempted from the operation of the rules of the Law of Citations which declared that, where the jurists differed, a majority of voices should decide, c. 1 § 4. 6 C. de veteri jure enucl. (1, 17). The writings of Paulus and more especially of Ulpian constituted the main body of the Digest (sup. p. 71).—As to Lenel's attempt to reconstruct the juristic writings from which excerpts were drawn, cp. sup. p. 75.

[6] Cp. Eisele, *Zur Diagnostik der Interpolationen* (*ZS. d. Sav. St.*, vol. vii. p. 15 ff); Gradenwitz, *Interpolationen in den Pandekten* (*ibid.* p. 45 ff); Schirmer, *Die angeblichen Interpolationen bei Scaevola* (*ibid.* vol. viii. p. 155 ff); Gradenwitz, *Interpolationen in den Pandekten*, 1887.

[7] By means of fifty imperial ordinances, the so-called 'quinquaginta decisiones,' the commission was supplied with the groundwork for settling the controversies in the writings of the jurists.

[8] The division of the Digest into seven parts had no significance except in regard to the then system of instruction. Pars prima (πρῶτα) comprises books 1 to 4 (general doctrines); pars secunda (de judiciis) books 5 to 11 (real actions); pars tertia (de rebus scil. creditis) books 12 to 19 (personal actions); pars quarta (umbilicus Pandectarum) books 20 to 27 (pledges, interest, evidence, marriage, guardianship); pars quinta books 28 to 36 (wills, legacies); pars sexta books 37 to 44 (bonorum possessio, intestate succession, &c.); pars septima books 45 to 50 (miscellaneous topics, including the 'libri terribiles,' books 47 and 48 on criminal law).

§ 17. de vet. jure enucl. 1, 17) of Dec. 15, 530 A.D., instructing Tribonian to undertake the composition of the Digest.

Const. TANTA = const. Δέδωκεν (at the head of the Corpus juris and in l. 2 C. eod.) of Dec. 16, 533 A.D., publication of the Digest with statutory force from Dec. 30 of the same year.

3. The Code.

The Code (in twelve books) is a collection of imperial constitutions, including both the separate decisions of the old type since Hadrian, and the general ordinances of the new type; in other words, a codification of imperial law (leges). As early as 528 A.D., Justinian had ordered a new code to be compiled on the basis of the Codex Gregorianus and Hermogenianus (which in this instance, then, were counted among the 'leges'), the Codex Theodosianus and the later ordinances. This Code was finished and published in 529 A.D. The subsequent composition of the Digest and Institutes, however, which involved a number of material changes in the law[9], necessitated a remodelling of the Code. The Code of 529 was repealed and a new Code published in 534. The Code in this its second edition (repetitae praelectionis) is the Code of our Corpus juris. The imperial constitutions which have been admitted are arranged in chronological order under their several titles. Here again, interpolations were, when necessary, resorted to with a view to bringing the contents of the earlier imperial ordinances into accordance with the law prevailing at the time. All earlier constitutions were deprived of validity. Just as the 'jus' had no validity except in the form of the Digest, so the 'leges' possessed no validity except in the form of the new Code of Justinian.

Const. HAEC QUAE NECESSARIO (prefixed to the Code) of Feb. 13, 528 A.D., containing orders for the composition of a new code (the first edition of the Code).

Const. SUMMA REIPUBLICAE (prefixed to the Code) of April 7, 529 A.D., publication of the first edition of the Code.

Const. CORDI NOBIS (prefixed to the Code) of Nov. 16, 534 A.D., publication of the second edition of the Code with statutory force from Dec. 29 of the same year.

[9] Especially through the 50 decisiones (sup. note 7).

The Corpus juris of Justinian was thus finished. The entire positive law had been cast into a final shape. All three parts, Institutes, Digest and Code, though published at different dates, were to have equal validity as parts of one and the same code of law. With a view to preventing new controversies, the writing of commentaries was forbidden. All doubtful points were to be referred to the emperor himself for decision. This explains the necessity for new constitutions (novellae constitutiones) which were already issued, in fairly large numbers, by Justinian himself (535–565). The 'novels' were afterwards collected (sup. pp. 13, 14). The collection of novels which was used by the glossators at Bologna (the Authenticum) was 'received' in Germany in the sixteenth century as the *fourth* part of the Corpus juris. § 17.

§ 18. *The Result.*

When Justinian composed his Corpus juris, Western Europe was in the hands of the German tribes who had founded their kingdoms on the ruins of the Western Empire. In these kingdoms, however, German law only applied to the conquering Germans, and not to the subject Romans, except so far as the constitution of the State came into question. Thus, in the German kingdoms of the Goths, Burgundians, Franks, &c., as far as the Roman-born section of the population was concerned, Roman private law, criminal law and law of procedure remained, on principle, in force in just the same manner as it had done before. The German kings therefore had some motive for protecting Roman law, and thus it came to pass that, even prior to Justinian, precisely the same thing was effected for the German kingdoms as Justinian accomplished for the East-Roman Empire, viz. a codification of Roman law. It is noticeable, how the tendency of Roman law, ever since the fifth century, was pointing more and more markedly in the direction of codification, i. e. of a comprehensive book of law which should facilitate the administration of justice. No sooner had a strong and efficient government sprung into being, whether in the East or the West—and as regards the West, the establishment of the German kingdoms was equivalent to a political regeneration—than the codification of § 18.

§ 18. Roman law forced itself upon it as something necessitated, as it were, by the very nature of the circumstances.

It was thus that about the year 500 A.D. (i.e. about thirty years prior to the Corpus juris of Justinian) the so-called 'Leges Romanae,' comprehensive records of Roman law, came into existence in the German kingdoms. Opposed to the 'Leges Romanae' were what we call now-a-days, the 'Leges Barbarorum,' i.e. the records of German tribe-law. The Lex Romana applied to the Roman, the record of German law (the Lex Burgundionum, Visigothorum, &c.) to the German members of the kingdom.

Leges Romanae of this kind were compiled in three German kingdoms, viz. those of the Ostrogoths, Burgundians and Visigoths. The Edictum Theodorici by Theodoric the Great, which probably dates from the years 511–515 A.D., is the Lex Romana of the Ostrogoths[1], the Lex Romana Burgundionum (also called 'Papian'), issued by King Gundobad about 500 A.D., is the Lex Romana of the Burgundians[2], and the Lex Romana Visigothorum (also called 'Breviarium Alarici'), issued by King Alaric II in 506 A.D., is the Lex Romana of the Visigoths[3].

The task which these German kings had set themselves to perform was the same as that undertaken by Justinian. But the difference in the results they respectively achieved was immense.

The Leges Romanae of the Ostrogoths and the Burgundians are nothing more than a lame attempt to set out in a brief form the principal provisions of Roman law so far as they appeared to be of practical importance. The Edict of Theodoric attempts to formulate matters in its own way, so that, in this respect, the Lex Romana Burgundionum has a certain superiority over it, in that it adheres more closely to the Roman originals. It is possible that, in both

[1] The Edictum Theodorici has this peculiarity that it was intended to apply not only to the Roman, but also to the Gothic subjects of the kingdom. The notion still prevailed here that the kingdom of the Ostrogoths formed a portion of the Roman Empire and that the Goths, being Roman soldiers, were, in their dealings with Romans, governed by Roman law as the existing law of the land. See, on this Edict, Brunner, *Deutsche Rechtsgeschichte*, vol. i. (1887), p. 365 ff.

[2] Cp. Brunner, loc. cit. p. 354 ff. On the name 'Papian' (a mutilation of Papinian), cp. infra, n. 5.

[3] Cp. Karlowa, *Röm. RG.*, vol. i. p. 976 ff; Brunner, loc. cit. p. 358 ff; Krüger, *G. d. Quellen*, p. 309 ff.

cases, the compilers availed themselves of so-called 'summaries,' i.e. brief résumés, with explanations of the sources of law, such as had sprung up in the literature of the fifth century in connection with the teaching of law[4]. But the spirit of Roman law has completely vanished from both these codes. What is here presented to us is a mere wreck. In the great invasion of the barbarians, which swept like a hurricane over the West, only the coarsest part of the materials has been rescued; all that is implied in artistic treatment, beauty of form and wealth of ideas has perished. What remains is but a tarnished torso, mutilated and insignificant. Not a trace of the grandeur and splendour of bygone times. In fact the self-consciousness of Roman law itself has perished. In both Leges we observe a strong tendency to absorb ideas of German law. German law already constitutes the stronger portion of the codes; its victorious career is about to commence. Nor had it any cause to dread the rivalry of such Roman law as was embodied in these two Leges Romanae. Roman law of *that* kind would never have subdued the world. § 18.

From the Lex Romana Visigothorum, however (the so-called 'Breviarium Alarici'), we carry away a somewhat different impression. Thanks to its geographical position Spain had enjoyed a greater immunity from the ravages of the Germanic invasion than any other portion of Western Europe. It was in Spain, then, together with that part of Gaul which lay south of the Loire, and which belonged to the Visigoths till 506 A.D., that the genuine spirit of Rome maintained its last energies. King Alaric, in composing his Corpus juris Romani, had very different intellectual powers at his disposal from Theodoric, though the kingdom of the latter included Rome itself. Hence the wide difference between the Hispano-Gallic Corpus juris and that of the Ostrogoths. The system upon which the Lex Romana Visigothorum was composed was similar to that subsequently observed by Justinian. Without attempting to expound Roman law in a form of their own, the compilers preferred to collect excerpts from the traditional sources of Roman law which were well

[4] We still possess 'summaries' of the Codex Theodosianus of this kind. Cp. Karlowa, *Röm. RG.*, vol. i. p. 963.

§ 18. fitted to preserve not only the substance of Roman law, but also its classic form. The greater part of the Lex Romana Visigothorum consists of the Codex Theodosianus together with the post-Theodosian novels in an abbreviated form, a number of constitutions being omitted. The Codex Theodosianus (which represents the 'leges') is followed by portions of the 'jus,' viz. the Institutes of Gajus in an abridged form, compressed into two books (the so-called 'Gothic Epitome of Gajus'), the 'Sententiae' of Paulus, portions of the Codex Gregorianus and Hermogenianus and—for courtesy's sake—a passage from Papinian by way of conclusion[5]. The rule followed was to leave the selected passages unaltered, but to accompany them with an 'interpretatio,' which regulates in a sensible manner the application of Roman law in the kingdom of the Visigoths (a kind of Gothic Usus modernus Pandectarum), the compilers perhaps availing themselves—in parts, at least—of summaries such as were to be found in juristic literature[6]. The 'liber Gaji' alone has no interpretatio, because the form in which the commission had found and adopted it was already an abbreviated one, an epitome, namely, of Gajus which had been prepared for purposes of contemporary legal instruction. It was therefore thought that, taken in this form, no further 'explanations' were required to adapt it to the existing state of the law, and the general understanding of the people.

We see, then, that the sources of law which were here drawn upon and reproduced, were very different from those used in the Leges Romanae of the Ostrogoths and Burgundians. The best portions, at any rate, of the imperial law were saved, and an attempt, at least, was made to preserve some parts of classical Roman jurisprudence for the legal system. The consequence was that, with the destruction of the kingdoms of the Ostrogoths and Burgundians, their codes ceased to have any further practical importance, whereas,

[5] In the MS. in which it was first discovered, the Lex Romana Burgundionum was joined on immediately and without any break to the Lex Romana Visigothorum, so that the heading of the last section of the Lex Visigothorum (Papinian. lib. i. responsorum) was taken to refer also to the Lex Romana Burgundionum. This is why it is sometimes called 'Papian,' i.e. Papinian. Cp. Brunner, *loc. cit.* pp. 356, 357.

[6] Cp. Fitting, *ZS. für RG.*, vol. ii. (1873), p. 222 ff.

on the other hand, the Breviarium Alarici maintained its vitality in Western Europe, in spite of the fact that, as regards Spain itself, it was set aside in the seventh century by the union of Romans and Goths under one single code (the remodelled Lex Visigothorum). The Roman Breviarium Alarici became the Lex Romana of Western Europe, and, down to the eleventh century, it exercised in this capacity (though frequently only through the medium of inferior abstracts) a dominant influence upon Romanic law in Southern France and some parts of South Germany (e. g. Upper Rhaetia). Even in the German convent-schools (e. g. St. Gall, Reichenau) the Breviarium was used in the early middle ages (10th and 11th centuries), in addition to the records of German law, as the basis of legal instruction[7]. With regard to Italy, however, the conquest of that country by Justinian, though only temporary, had nevertheless resulted in its adopting the Corpus juris of the Eastern empire. Thus, from the sixth century onwards, the Corpus juris of Alaric, king of the Visigoths, and the Corpus juris of Justinian confronted each other as rivals, the former predominating in the West, the latter in the East. Which was to be the Corpus juris civilis of the future? § 18.

The question was decided in favour of Justinian's code. The school of glossators who revived the study of Roman law in Italy in the twelfth century, took Justinian's Corpus juris (which was in force in Italy) as their starting point, and with the triumphant spread of Italian jurisprudence, the East-Roman Corpus juris found its way to the West. The Corpus juris of the German king was destroyed by the Corpus juris of the emperor of Byzantium.

It would, however, be erroneous to suppose that the decision in favour of Justinian's Corpus juris was due to a mere accident of history. It was rather the intrinsic value of what Justinian had achieved that found outward expression in the success which attended it. And the intrinsic value of Justinian's compilation consisted in this that it had succeeded in mastering the juristic *literature*, and in grasping, and handing down, to future ages, through the excerpts embodied in the Digest, the true spirit of

[7] Fitting, *ZS. d. Sav. St.*, vol. vii. pp. 86-90; Fitting, *Die Anfänge der Rechtsschule zu Bologna* (1888), p. 31.

§ 18. Roman jurisprudence. Important as the practical influence of imperial legislation had been in moulding the law, nevertheless it is not there we must look for the seat of that strength which guaranteed Roman law its indestructibility. What was so entirely unique in the achievements of Roman law was, simply and solely, its masterly treatment of the casuistry of private law, a treatment which, while discovering the laws of a particular case, revealed, at the same time, both the elements of the cases, and the principles inherent in these elements, which govern all private transactions in general, and more particularly those which result in obligations,—a treatment which had solved the great problem how to reconcile a free, equitable discretion with fixed rules, the vindication of the concrete individual intention with the necessary subjection to its immutable, innate laws. It was in the writings of the Roman jurists alone that this masterpiece of Roman law had been accomplished. Whoever, therefore, had mastered the Roman jurists had mastered what was true, genuine, and imperishable in Roman law. But it was not everybody that could master and understand the jurists, as we see most conspicuously in comparing Justinian's code with the others. Even the compilers of King Alaric's code had found the great works of Papinian, Ulpian, Paulus, &c. difficult and unintelligible. They were content with the light fare with which the short 'maxims' (sententiae) of Paulus and the Institutes of Gajus, in their abridged form, supplied them. They had thus renounced what constituted the real strength of Roman jurisprudence. In the main, therefore, the Lex Romana Visigothorum is nothing more than a collection of ukases, of imperial constitutions. Roman law, in this shape, was as unfit to be 'received' in Germany as it was in the shape of the other Leges Romanae. But it was different with the advisers and professors of Justinian; *they* were still qualified to read and extract the great jurists with intelligent appreciation. It was in *their* Corpus juris alone that Roman law stood forth in all its splendour and world-subduing power. The Corpus juris of Justinian, and it alone, has preserved, and rescued for all future ages, the great masterpiece of Roman jurisprudence. In this form, and in no other, could Roman law be received in

Germany. And so it actually happened. Thus we are still living in this as in other respects on what the intellectual forces of Byzantium accomplished for us by preserving and transmitting the treasures of antiquity. § 18.

This, then, was the great feat which Justinian had achieved by his Corpus juris. Roman law, as a work of art, had been definitely finished, and had, at the same time, been cast into a comprehensive form which saved it from destruction. No matter now whether the Roman state perished or not, Roman law was strong enough to survive the Roman empire.

PART II.

THEORETICAL PART.

§ 19. *The System of Private Law.*

§ 19. PRIVATE Law is the sum of moral rules which, while distributing among individuals a certain power over the outside world, regulate the economic conditions of human society. It is concerned with the dominion of persons over things or that which has the value of things (§ 7). Private Law is thus identical with the Law of Property.

Hence it is that in Private Law the *person* always appears as the subject, never as the object of a legal right. The Law of Persons, as a department of Private Law, is identical with the law of the subject of private (i. e. proprietary) rights; in other words, it is concerned with the capacity of holding property ('proprietary capacity').

And conversely, in private law the *thing* is always the object of a legal right. But it may be subjected to the will of the person invested with the right in one of two ways: either directly, the right existing over the thing itself (real rights)*; or indirectly, i. e. through the medium of the act of another, the debtor (obligatory rights). The purpose of real rights (such as ownership) is to enlarge, at once and definitively, the scope within which the person entitled may exercise his power. Real rights are thus the *final end* of proprietary dealings. On the other hand, the purpose of obligatory rights is

* *Translator's Note.* The term 'real rights' will be used throughout in the sense as here defined, i. e. in the distinctive sense of the German term 'Sachenrechte.'

to make over to the creditor, by means of the act of the debtor, at some future time, a thing or that which has the value of a thing. Obligatory rights are thus the *means* of proprietary dealings. In accordance with this difference in the nature of proprietary rights the Law of Property is divided into the Law of Things (which is concerned with real rights) and the Law of Obligations (which is concerned with obligatory rights). § 19.

In ordinary dealings, however, proprietary rights do not always appear separately. A person's property is affected *in its entirety* both by the position he occupies in his family, and by its devolution on his death. The rules on these subjects are comprised in the Law of the Family and the Law of Inheritance respectively. Family Law deals with the effects which the position of an individual in his family exercises on his property. The Law of Inheritance deals with the effect of death on the property of the deceased. Inasmuch as the effects which family relations produce upon property are determined by the nature of these relations, it is usual, in explaining the legal effects which family relations exercise upon property ('Applied Family Law'), to couple therewith the legal rules on these family relations themselves ('Pure Family Law').

The system of Private law thus consists of three great departments:

1. the Law of Persons, being the law of proprietary capacity;

2. the Law of Things and Obligations, being the law of property with reference to its constituent parts.

3. The Law of Family and Inheritance, being the law of property viewed in the aggregate.

The law of property in reference to its constituent parts, i. e. the law of things and obligations, which is usually called the law of property simply (in the narrower sense of the term), should be preceded by a general part, dealing with those principles which are equally applicable to all proprietary rights. Thus we have the following arrangement:

I. The Law of Persons (or the law of the subject of property).

II. The Law of Property (or the law of the constituent parts of property).

§ 19.

1. General part.
2. The Law of Things.
3. The Law of Obligations.

III. The Law of Family and Inheritance (or the law of the aggregate of property).

1. The Law of the Family.
2. The Law of Inheritance.

Running through all the details of exposition, we shall find this one fundamental idea, that private law is identical with the law of property.

BOOK I.

THE LAW OF PERSONS.

§ 20. *The Conception of 'Person' and the Kinds thereof.*

§ 20. To be a 'person,' within the meaning of private law, means to be capable of holding property, of having claims and liabilities. A person, then, in the sense of private law, is a subject endowed with proprietary capacity.

We distinguish, in the sense of private law, two kinds of persons: firstly, natural, and secondly, juristic persons. A 'natural person' is a human being with proprietary capacity. A 'juristic person' is a subject other than a human being which is invested with proprietary capacity (e.g. the state, a municipality). All rights ultimately centre in human beings. But it is sometimes desired, for definite purposes, e. g. for the purposes of the state or a community, to withdraw certain property from the arbitrary disposition of individuals. It is therefore assumed to vest in an invisible subject, in other words, in a 'juristic' or 'moral' person. Of juristic persons, again, we have two kinds: (1) corporations, i. e. aggregates of persons which are endowed with proprietary capacity (e. g. a municipality, a university, the state); (2) foundations, i. e. institutions with proprietary capacity, e. g. a hospital to which proprietary capacity has been granted.

The proprietary capacity of a human being does not commence till he is actually born. The legal maxim: 'nasciturus pro jam nato habetur quoties de commodo ejus agitur,' merely means that the legal capacity of the natus is sometimes determined by referring

§ 20. back to a time when he was still nasciturus. Thus an inheritance is kept open for the nasciturus so as to make it vest in the natus, in the same way as though he had been already actually born at the moment of devolution.

The conception of a 'juristic person' was unknown to the earlier Roman law. The jus privatum was throughout a law for the individual only, and hence, as far as the old private law of Rome was concerned, there could be no subject of rights and duties other than a natural person, i. e. an individual. There were indeed societies (collegia, sodalitates), but none that were endowed with proprietary capacity. The property which was designed for the purposes of the society had to be formally vested in an individual member and treated as though it were his separate property. True, the state, the populus Romanus, as such, had property (the ager publicus, the aerarium, &c.) and entered on proprietary dealings by concluding juristic acts, such as letting, selling, &c. But the property and juristic acts of the state were not governed by jus privatum, but by jus publicum. Thus, within the domain of private law the state, like the societies, never appeared as the subject of legal rights. State property belonged, in fact, to the res publicae, and, as such, lay outside the range of private law ('res extra commercium,' § 46). In the same way, the juristic acts which the state concluded were not actionable in the ordinary civil tribunals. The law was not available against the state as against a private individual. In its proprietary as in other relations the state was consistently paramount over the individual citizen; under no circumstances were they treated as co-ordinate. This is the reason why, on the one hand, the state itself, on principle, protected its property (the res publicae) by the administrative acts of its magistrates, and why, on the other hand, a private person could not sue the state on a juristic act concluded by the state, but had likewise to resort to administrative proceedings by lodging his complaint at a public office. The so-called 'res sacrae,' or things consecrated to the gods, stood, in all essentials, on the same footing as the res publicae. Like these they lay outside the scope of private law ('extra commercium') and were protected by forms of administrative procedure. Thus in regard to

res sacrae, again, the idea that established itself was not that they were the private property of a juristic person, e. g. the gods or some religious institution, but rather that they were excluded from all private ownership. Within the sphere of the jus privatum none but the individual, the 'natural' person, within the sphere of the jus publicum (and jus sacrum) none but the state could be the subject of rights. § 20.

The conception of a collective juristic person as a possible subject of *private* rights was not developed till towards the close of the republic with the rise of the system of municipal government. The property of the municipium or town-community was brought under the private law, and the municipium thus acknowledged as a person capable of private rights and duties. After the example of these municipalities ('ad exemplum rei publicae') lawful societies (collegia, sodalitates, universitates) were likewise acknowledged to possess proprietary capacity in the domain of private law. And finally, when the property of the emperor, the fiscus Caesaris, came to be more and more avowedly identified with the property of the state, the Roman state too, in the form of the fiscus, was ranged among the private persons, though the numerous fiscal privileges it enjoyed remained to testify to its original exemption from the rules of private law.

The conception of a juristic person had thus obtained recognition in the Roman law of the empire. The problem now was to determine its precise nature.

What is a community or corporation viewed as the subject of rights? What do we mean by saying a community or a corporation has rights and liabilities? The crude view of the matter would be that the rights of a community mean the rights of its citizens, and the rights of a corporation mean the rights of its members,—in other words, joint rights and joint liabilities. German mediaeval law never got beyond this stage. And traces of the same notion are perceptible in Roman law too, a notion according to which a community or a corporation means simply the sum total of its members, the municipes, the cives, the universi, and according to which therefore, a corporation represents a corpus incertum (because

§ 20. its members change), a persona incerta[1]. But among the rules of Roman law there was one touching corporations, which, in any logical course of evolution, was bound to lead to, and actually did lead to, the development of a different view. The rule we refer to is this: A slave may not be tortured with a view to extorting information against his master, but the slave of a corporation may be compelled, by torture, to give information against the members of that corporation: *nec enim plurium esse videtur sed corporis*, i. e. the slave of a corporation (corpus) is not the joint property of the separate members, but the sole property of another person, an invisible, a 'juristic' person, namely, the 'corpus.' Again: si quid universitati debetur, singulis non debetur, *nec quod debet universitas, singuli debent.* In other words, the rights of a corporation (e. g. of a town-community) are not the rights of the members of the corporation, and the liabilities of the corporation are not the liabilities of the members of the corporation. The individual members of the corporation cannot be made answerable for the debts of the corporation. Rights and liabilities of a corporation do not mean joint rights and joint liabilities of the members, but sole rights and sole liabilities of another person, an invisible, a 'juristic' person, namely, the 'corpus.'

In Roman law the property of a corporation is the sole property of the collective whole; and the debts of a corporation are the sole debts of the collective whole (the corpus). The rights and liabilities of a corporation are not the joint rights and liabilities of the sum total of its individual members, but the sole rights and liabilities of the collective whole of its members. This collective whole, this invisible unity of members, which is called into existence, and lives, by means of the corporate constitution, and which operates, not through the medium of another person, but immediately—is a new subject of rights and duties, a new person quite distinct from all its members. Such is the juristic person of Roman law. It represents a kind of ideal private person, an independent subject capable of holding property, totally distinct

[1] A juristic person, in its capacity as a corpus incertum, was disqualified from being an heir. Ulpian, tit. 22, 5: Nec municipia nec municipes heredes institui possunt, quoniam incertum corpus est, et neque cernere universi neque pro herede gerere possunt, ut heredes fiant.

from all previously existing persons, including its own members. § 20.
It possesses, as such, rights and liabilities of its own. It leads its own life, as it were, quite unaffected by any change of members. It stands apart as a separate subject of proprietary capacity, and, in contemplation of law, as a stranger to its own members. The collective whole, as such, can hold property; its property, therefore, is, as far as its members are concerned, another's property, its debts another's debts.

This sharp line of demarcation between the collective person and the separate members expresses the fundamental idea underlying Roman law. From the point of view of private law, the collective person and its members have nothing whatever to do with one another. As far as the property of the whole is concerned, the members are not members, but strangers. The collective person is quite a different person, a juristic person, a third person, over and above the natural persons who are its members.

It is at the moment when those corporate bodies of social life which stand above the individuals, more especially when such great organizations as the state, the church, the town and village community, which are governed by public law, step into the domain of private (i. e. property) law in order to assert their claim to be admitted, together with the individual persons, and in the interests of society, and consequently of all, to share in the goods of this world—it is at this moment that the legal rules concerning juristic persons come into play. Roman private law had originally no room for these gigantic corporate personalities so vastly exceeding the dimensions of the individual personality. Originally, it was neither capable nor desirous of supplying the law for any other proprietary relations but those of private persons in the strictest sense of the term, i. e. individual persons. Nevertheless the Roman lawyers succeeded, as we have seen, in securing the recognition of corporations within the domain of private law. But it was just the very difficulty which Roman law had to solve which made its doctrine of juristic persons so conclusive in its lucidity. Roman private law—such is the reasoning—endeavours to be a law for the individual person. If therefore the corporate collective person

§ 20. is to be admitted to private law, it must first discard all its social characteristics, it must discard all that power by which it transcends the dimensions of an individual person; the sovereign state itself must put aside its majesty, before it can pass into the humble realms of private law. However public, in other respects, the character of a corporation, such as the state or a community, may be, the keen analysis of Roman private law reduces it to a new kind of private person, to wit, a new, ideal individual, which takes its place in the ranks of other individuals ('natural' persons). By this means, the traditional conceptions of private law, the conception of a person as an individual, of individual property and individual liabilities, can be applied, without alteration, to these new corporate subjects of private rights and duties. In point of law, the collective person is a new individual like other individuals. Hence the clear line which separates the collective person from the persons of its members, and the property of the collective person from the property of its members. Roman law contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping, and distinguishing from its members, the collective whole as the ideal unity of the members bound together by the corporate constitution; in raising this whole to the rank of a person (a juristic person, namely), and in securing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other private persons. German law never got beyond the notion of the natural person visible to the physical eye. True, it succeeded in working out the idea of a community of legal rights and duties in a larger variety of forms than Roman law, and the practical results which it was able to achieve within the German communities and associations by means of a system of common property (of societies), coupled with an organized method of administration, were the same as those achieved by Roman law with its conception of a juristic person. True also, that in the local laws of German towns the beginnings of an attempt to treat the town-community as an independent subject of rights and duties are already discernible. Nevertheless, that simple formula which declares that

the property of organized bodies (corporations) is the sole property of a new ideal subject, and thus, at one stroke, marks off the property of the whole clearly and sharply from the property of its members, the formula, in other words, of the juristic person, was discovered in the domain of Roman law and was adopted in Germany from Roman law by means of the 'reception.' § 20.

A natural person, then, is a visible individual person, a human being; a juristic person, within the meaning of private law, is an ideal individual person with proprietary capacity, created by means of organization. The collective whole must, in point of law, be regarded as a unit before it can be ranged among jural subjects as a special kind of person, independent in itself and outlasting all changes of its members [2].

L. 7 D. de statu hom. (1, 5) (Paulus): Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quotiens de commodis ipsius partus quaeritur, quamquam alii, antequam nascatur, nequaquam prosit.

L. 1 § 1 D. quod cujusque univ. nom. (3, 4) (Gajus): Quibus autem permissum est corpus habere collegii, societatis sive cujusque alterius eorum nomine, proprium est ad exemplum reipublicae habere res communes, arcam communem et actorem sive syndicum, per quem tamquam in republica, quod communiter agi fierique oporteat, agatur, fiat.

L. 7 § 1 eod. (Ulpian.): Si quid universitati debetur, singulis non debetur, nec quod debet universitas, singuli debent.

L. 1 § 7 D. de quaest. (48, 18) (Ulpian.): Servum municipum posse in caput civium torqueri saepissime rescriptum est, quia non sit illorum servus sed rei publicae, idemque in ceteris servis corporum dicendum est: nec enim plurium servus videtur, sed corporis.

L. 16 D. de verb. sign. (50, 16) (Gajus): Civitates enim privatorum loco habentur.

[2] On the above subject, see Mommsen, *De collegiis et sodalitiis Romanorum* (1843); Gierke, *Das deutsche Genossenschaftsrecht*, vol. 3 (1881), pp. 34–106; and the recent essay by Saleilles, *Le domaine public à Rome* (Nouv. Revue histor. de droit français et étranger (1888), p. 497 ff.).—Sohm, *Die deutsche Genossenschaft* (Festschrift für Windscheid, 1888).

§ 20. Among human beings the theory of Roman law distinguishes three kinds of 'status' (i. e. degrees of legal capacity among men): the status libertatis (according to which men are either free or slaves); the status civitatis (according to which freemen are either Roman citizens or aliens); the status familiae (according to which a Roman citizen is either a paterfamilias or a filiusfamilias).

L. 11 D. de cap. min. (4, 5) (PAULUS): Tria sunt, quae habemus: libertatem, civitatem, familiam.

§ 21. *Slavery.*

§ 21. Slavery destroys the dignity of man and places him, in the eye of the law, on a level with the beasts. A slave, therefore, is a human being who is, legally, not a person but a thing. He is exposed to the arbitrary power of his master. His master owns him, has dominium over him, in other words, has power over the body of the slave. Nevertheless a slave is also invested with a natural personality, and was to some extent acknowledged to be so by Roman law. Thus he is capable of concluding juristic acts, of managing, independently, certain property of his master's, called 'peculium' (§ 75), and of committing delicts. According to the theory of the classical jurists, he may even incur a contractual obligation, though only a 'natural' one, i. e. the creditor cannot proceed against him by action (§ 71, *initio*)[1]. Thus the slave has a will which is allowed to produce certain legal effects in accordance with the principles of law just stated. In point of law, however, the will of the slave and, in fact, his mental faculties in general, operate, on principle, where they operate at all, for the benefit of his master. The master does not only own his slave as he does

[1] The master is liable to a noxal action for the delict of his slave (§ 73, 5); but if the slave is manumitted, he may be sued himself. The contract of a slave never renders the slave himself liable to an action, not even after he has been manumitted, but the master is liable, if the requirements of an actio adjecticia (§ 75) have been satisfied. Nevertheless, like other natural obligations, so the 'naturalis obligatio servi' may be validly secured by sureties or discharged by payment, i. e. the surety may be sued on the guaranty, and money paid under the contract cannot be recovered.

a thing, but he has besides a power over his slave similar to that which he possesses over his son, namely, the 'dominica potestas,' i. e. a power not merely over the body, but over the will of his slave. Whatever a slave acquires, he acquires for his master. § 21.

During the empire several laws were enacted subjecting the master's power over the body of his slave to legal restrictions, with a view to protect male slaves from cruel treatment and female slaves from prostitution.

Within the sphere of the jus sacrum the slave was, from the very outset, and within certain limits, acknowledged as a person. Thus he can validly bind himself to the gods by vow (votum) and oath; the grave of a slave is a 'locus religiosus' (§ 46, I a), and slaves appear as members of religious associations [2].

> Gaj. Inst. I. § 52: In potestate itaque sunt servi dominorum. Quae quidem potestas juris gentium est: nam apud omnes peraeque gentes animadvertere possumus, dominis in servos vitae necisque potestatem esse: et quodcumque per servum adquiritur, id domino adquiritur.
>
> L. 1 § 8 D. de off. praef. urbi (1, 12) (Ulpian.): Quod autem dictum est, ut servos de dominis querentes praefectus audiat, sic accipiemus:—si saevitiam, si duritiam, si famem, qua eos premant, si obscenitatem, in qua eos compulerint vel compellant, apud praefectum urbi exponant. Hoc quoque officium praefecto urbi a d. Severo datum est, ut mancipia tueantur, ne prostituantur.
>
> Gaj. Inst. I. § 53: . . . ex constitutione imperatoris Antonini, qui sine causa servum suum occiderit, non minus teneri jubetur, quam qui alienum servum occiderit. Sed et . . . praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere.

Slavery may originate in the following ways:

(1) by birth, if the mother is a slave when the child is born. But if she were free for any period during gestation, however short, it is sufficient to make her issue free.

[2] Cp. A. Pernice, *Sitzungsberichte der Berliner Akademie der Wiss.*, vol. 51 (1886), p. 1173 ff.

21. (2) by capture in war;

(3) by condemnation on a criminal charge (a 'servus poenae'; for example, if a man is condemned to the mines or to be killed by wild beasts).

A slave becomes free by manumission, i.e. by a positive grant of liberty on the part of his master. Early Roman law developed a variety of forms of manumission:

(1) Manumissio vindicta, the oldest form, is a form of manumission by means of in jure cessio (sup. pp. 30, 31). A third party, in the presence of the praetor, lays his rod (vindicta) on the slave and at the same time claims him as free (vindicatio in libertatem). The master admits his freedom and the praetor accordingly declares the slave free. Subsequently the forms of an action at law were dropped and all that remained was the declaration by the master, in court, of his desire to enfranchise his slave.

> Ulp. tit. 1 § 7: Vindicta manumittuntur apud magistratum populi Romani, velut consulem praetoremve vel proconsulem
>
> L. 8 D. de manum. vind. (40, 2) (Ulpian.): Ego cum in villa cum praetore fuissem, passus sum apud eum manumitti, etsi lictoris praesentia non esset.

(2) Manumissio censu, i.e. by entry on the registers of citizens;

(3) Manumissio testamento, i.e. by means of a direct testamentary grant of liberty. The testator himself enfranchises the slave at the moment when the will becomes operative. The slave is thus the freedman of a deceased person, namely the testator, and is for this reason called 'libertus orcinus.' It is different if the bequest of liberty is indirect, i.e. if the master merely imposes a trust on his heir to manumit the slave ('fideicommissaria libertas'). In such a case the slave does not become free by virtue of the will, in other words, he does not, as in the former case, become free, ipso jure, at the moment when the will becomes operative, but only when the heir carries out the trust and performs the act of manumission (e.g. vindicta). The slave is then the freedman of a living person, namely the heir, and has been manumitted not testamento,

but vindicta, or censu, or in ecclesia, or by some informal method, as the case may be. § 21.

> Ulp. tit. 2 § 7: Libertas et directo potest dari hoc modo: LIBER ESTO, LIBER SIT, LIBERUM ESSE JUBEO, et per fideicommissum, ut puta: ROGO, FIDEI COMMITTO HEREDIS MEI, UT STICHUM SERVUM MANUMITTAT. § 8: Is, qui directo liber esse jussus est, orcinus fit libertus; is autem, cui per fideicommissum data est libertas, non testatoris, sed manumissoris fit libertus.

Constantine's legislation added a fourth mode, viz. manumissio in ecclesia: the master makes a declaration in the presence of the bishop and congregation of his desire to enfranchise the slave, and the slave is thereby manumitted.

Informal manumissions were void at civil law. If, however, a slave had been informally manumitted, the praetor would protect him in the enjoyment of his freedom, and would, therefore, in such cases, refuse the master the vindicatio in servitutem. The praetor bestowed his protection in the same way on those whose manumission had, indeed, been properly carried out, but whose master was only a bonitary owner, i. e. a person whose ownership in the slave was only acknowledged by jus honorarium (§ 49). The lex Junia Norbana[3] subsequently provided that all such freedmen as enjoyed their liberty tuitione praetoris should be legally free, their freedom, however, being only of the kind enjoyed by Latini coloniarii. Hence such freedmen were known as Latini Juniani (§ 22). Justinian, finally, having done away with the distinction between bonitary and quiritary ownership (§ 49), granted to freedmen who had been informally manumitted the same kind of freedom as that enjoyed by freedmen who had been formally manumitted, to wit, the freedom of a Roman citizen, provided only that the declaration by the master of his desire to enfranchise—whether it were in writing (per epistulam) or by oral declaration (inter

[3] The year 19 A. D. is usually given as the date of this lex, but both its date and name (was it only called lex Junia?) are doubtful. Cp. Mommsen in Bekker's u. Muther's *Jahrbücher d. gemeinen R.*, vol. ii. p. 338; Schneider, *ZS. d. Sav. St.* vol. 5, p. 225 ff., vol. 7, p. 31 ff.

§ 21. amicos)—were attested by five witnesses, or else that the slave had attended his master's funeral 'pileatus,' i. e. wearing the pileus or felt cap which was the badge of the freeman.

> L. un. § 1 C. de Lat. lib. toll. (7, 6) (JUSTINIAN.): Sancimus itaque, si quis per epistulam servum suum in libertatem producere maluerit, licere ei hoc facere, quinque testibus adhibitis, qui post ejus litteras . . . suas litteras supponentes fidem perpetuam possint chartulae praebere. Et si hoc fecerit . . . libertas servo competat quasi ex imitatione codicilli delata, ita tamen, ut et ipso patrono vivente et libertatem et civitatem habeat Romanam. § 2: Sed et si quis inter amicos libertatem dare suo servo maluerit, licebit ei, quinque similiter testibus adhibitis, suam explanare voluntatem: et . . . servi ad libertatem producantur Romanam quasi ex codicillis similiter libertatem adipiscentes. § 5: Sed et qui domini funus pileati antecedunt . . . si hoc ex voluntate fiat testatoris vel heredis, fiant ilico cives Romani.

A person who has been duly manumitted in accordance with the law (libertus), becomes a Roman citizen, without, however, obtaining the full rights of a citizen. He has indeed the suffrage, but he can only exercise it—during the republic at least—in one of the four tribus urbanae (where he is thrown together with the whole mass of the city populace), and is thus debarred from the more select tribus rusticae. He is also excluded from the jus honorum, or capacity for office, and is disqualified from entering the senate, the council (curia) of a municipium and the legion. The stigma of his unfree parentage still adheres to him. Thus, though in matters of private law he shares all the rights of a Roman citizen (jus commercii and jus connubii)[4], nevertheless he is denied full participation in matters of state.

Manumission is a kind of new birth. The master (patronus) therefore stands to his freedman in a relation analogous to that between father and son. The patron, as such, is entitled, as

[4] The lex Julia and the lex Papia Poppaea, however, forbid intermarriages between senators (and their children) on the one hand, and freedmen on the other (inf. § 86).—The position of freedmen is discussed by Mommsen, *Röm. Staatsrecht*, vol. 3, p. 420 ff.

against his libertus, to a father's rights of succession and guardian- § 21.
ship. He has the same claim to be treated with respect as he has against his son. He can claim to be supported by the libertus, if he falls into poverty. He is, lastly, entitled to certain services on the part of the freedman, which he can, if necessary, enforce by action, provided only the freedman had promised them after his manumission and in a manner not derogatory to his liberty.

On the death of the patron the jura patronatus devolve on his children. But the children of a libertus are ingenui.

A freedman can be declared an ingenuus, or free-born man, by imperial decree (the so-called 'natalium restitutio'). The effect of this gift is to extinguish all the other restrictions on his liberty together with the relation of patronatus. The bestowal by the emperor of the so-called 'jus aureorum anulorum,' i. e. the right to wear a golden ring, the mark of equestrian rank (which under the empire was worn by all freeborn persons), also confers full freedom, but leaves the jura patronatus untouched. By a general enactment (Nov. 78, cap. 1. 2. 5), Justinian conferred on all freedmen the jus aureorum anulorum and the natalium restitutio, the latter, however, on condition that the patron waived his patronal rights. Under this new law of Justinian, then, every freedman, as such, enjoyed complete freedom. For the public law of the Byzantine despotism in which the ancient civic liberty has disappeared is indifferent to the stigma of unfree parentage.

L. 7 § 2 D. de injur. (47, 10) (Ulpian.): Etenim meminisse oportebit, liberto adversus patronum non quidem semper, verum interdum injuriarum dari judicium, si atrox sit injuria, quam passus sit, puta si servilis; ceterum levem coercitionem utique patrono adversus libertum dabimus.

L. 1 § 5 D. quar. rer. act. (44, 5) (Ulpian.): Quae onerandae libertatis causa stipulatus sum, a liberto exigere non possum; onerandae autem libertatis causa facta bellissime ita definiuntur, quae ita imponuntur, ut, si patronum libertus offenderit, petantur ab eo, semperque sit metu exactionis ei subjectus, propter quem metum quodvis sustineat patrono praecipiente.

§ 21. Already towards the close of the republic the freedmen had begun to make themselves felt as a large class whose existence was not exactly conducive to the interests of the state. For the slaves that the masters got rid of by means of manumission were not always the best of their class, and, in any case, a large amount of foreign blood and foreign elements were being imported into the community of Roman citizens by the crowds of Greek, Syrian, Phoenician, Jewish, and African slaves. Hence it was that certain measures were resorted to which aimed at restricting the practice of manumission. Thus in the year 4 A. D. the lex Aelia Sentia enacted, firstly, that such slaves as had been convicted of a crime should, on manumission, become, not Roman citizens, but only dediticii, i. e. homeless aliens (§ 22), who were forbidden to reside within Rome and were for ever debarred from acquiring the civitas. The same law enacted, secondly, that no manumission should take full effect, unless the master were at least twenty, and the slave at least thirty years old; failing which, a complete legal manumission could only be effected vindicta, in other words, with the co-operation of the magistrate and only after the consilium, i. e. the legal advisers of the magistrate [5], had satisfied themselves that there were special reasons why the manumission should be allowed. Thirdly, the lex Aelia Sentia enacted that all manumissions carried out by an insolvent debtor to the injury of his creditors (in fraudem creditorum) should be void. Another law, the lex Fufia Caninia, which fixed the maximum of testamentary manumissions within certain limits (ex tribus servis non plures quam duos, usque ad x dimidiam partem manumittere concessit, &c.), was repealed by Justinian (tit. I. 1, 7: de lege Fufia Caninia sublata).

[5] It was, in any case, the usual practice for the magistrate to take the advice of a consilium, and in regard to this particular case the lex Aelia Sentia made it compulsory on him to do so, at the same time laying down rules for the composition of the said consilium: Romae quinque senatores et quinque equites Romani, in provinciis viginti reciperatores cives Romani (Ulpian, tit. 1 § 13).

NOTE.—*Relationships akin to Slavery.*

1. 'Statu liber' is one whom his master has manumitted by his will, subject however to a condition precedent or the lapse of a specified time. Till the condition happens or the appointed day arrives, he is, in the eye of the law, a slave. But the fulfilment of the condition or the arrival of the day converts him ipso jure into a free man, even though meanwhile he may have become the property of another man (to whom the heir may have alienated or pledged him, or who may have acquired him by usucapio: seu alienetur ab herede seu usu capiatur ab aliquo libertatis condicionem secum trahit. Ulpian, tit. 2 § 3). § 21.

2. 'Bona fide serviens' is the name given to a freeman who lives in the bona fide belief that he is the slave of his master. As long as he remains in this condition, his juristic acts are governed by the same rules as those of slaves.

3. 'Esse in libertate' is a term applied to a slave who is in actual enjoyment of liberty. As long as he remains in this state, his acts are governed by the same rules as those of freemen.

4. 'Clientes' were, in the early law, the hereditary dependants of a patrician family, who were bound to certain payments and services, and also to private attendance on their master (patronus) in war. They were subject to the discipline and family power of the patron, and their sole protection lay in the fiduciary nature of the relations which subsisted between patron and client (vassal) and which operated within the jus sacrum. According to an opinion of Mommsen (*Röm. Staatsr.* vol. 3, p. 66 ff.), these clients subsequently developed into the Roman plebs.

5. 'Coloni' are the villeins of the later empire. Though personally free, they are attached to the soil, glebae ascripti, i.e. they may not quit the land and are part and parcel of the estate. They bear a strong resemblance to the serfs of later times. (Cod. l. 1 § 1 C. de col. Thracensib. 11, 52 (Theodos. II): Licet condicione videantur ingenui, servi tamen terrae ipsius, cui nati sunt, aestimentur nec recedendi, quo velint, aut permutandi loca habeant facultatem, sed

§ 21. possessor eorum jure utatur et patroni sollicitudine et domini potestate).

§ 22. *Cives and Peregrini.*

§ 22. In our own times the importance of citizenship is confined to matters of public law, such as the franchise, the liability to taxation, &c. In ancient law, however, citizenship is, at the same time, a most decisive element in determining the extent of a person's private rights.

A civis is a Roman citizen, i. e. a man who, in the eye of Roman law, has full legal capacity in matters of public law (jus suffragii and jus honorum) and who alone has full legal capacity in matters of private law (jus commercii and jus connubii). His capacity is recognized not merely by the jus gentium, but also by the jus civile. He can contract a Roman marriage, make a Roman will, own property ex jure Quiritium, &c. A peregrinus, on the other hand, is a person who, though not a citizen of Rome, is nevertheless (unless he be a dediticius) a citizen of another community. He is completely shut out from the public rights of a Roman citizen, and, in regard to private rights, his capacity is acknowledged by the jus gentium only [1],—unless indeed he has been expressly granted the jus commercii and jus connubii by means, say, of an international treaty (§ 12). A peregrinus, as such, cannot therefore acquire true Roman ownership (dominium ex jure Quiritium), nor can he have the patria potestas or marital power (manus) or tutela (guardianship) of a Roman. He cannot acquire property by mancipatio; he cannot execute a Roman will; he cannot be made heir, legatee or testamentary guardian under the will of a Roman citizen, nor can he even take part as a witness in any such juristic acts of the Roman civil law. Full legal and commercial capacity in accordance with the

[1] In the oldest times a non-citizen was regarded as destitute of legal rights, the only exception being made in favour of 'hostes,' i. e. citizens of a state allied to Rome by a treaty of friendship (Hostis meant originally a 'guest'). This notion of absolute rightlessness, however, never existed except in theory. It was thus that, in consequence of the development described above (§ 12), the non-citizen, who at first had no rights at all, came to acquire his legal capacity under the jus gentium.

Roman jus civile (in the narrower sense of the word) is, on principle, exclusively reserved for the Roman citizen. § 22.

It would, however, be a mistake to suppose that a peregrinus could not make a will or become a guardian at all, in other words, that for him all those legal acts and legal effects had simply no existence. On the contrary, he is fully qualified to make a will or acquire ownership, &c., in accordance with the law of his own community. Thus, for instance, if he is an Athenian citizen, he may have the parental and marital power of Athenian law, he may make an Athenian will, and be appointed heir in the will of an Athenian citizen, and so forth. And just as an Athenian citizen is unable to make a Roman will and is shut out from the legal effects which such a will produces, so a Roman citizen is unable to make an Athenian will and is disqualified from acquiring any rights under such a will. This antithesis of mutually exclusive states and communities is a fundamental principle of ancient life. The citizen of each political community is fully qualified only within the confines of his own community, and upon his qualification as a citizen depends his full capacity in respect, not only of public, but also of private rights. It was, however, a natural consequence of the preponderance acquired by Roman law throughout the Roman empire that, in reference also to private rights, the possession of a special legal qualification according, say, to Athenian or Alexandrian law, should be deprived of much of its value. The result was that, as compared with Roman citizens, the foreigners found themselves virtually placed under disabilities in regard not only to public but also to private rights. And when the old idea of a local polity and a local citizenship came to be gradually superseded by the idea of an imperial polity and an imperial citizenship, the continuance of the existing state of affairs could not fail to be felt as increasingly harsh and unjust. It was here that the Emperor Caracalla took the decisive step of conferring the Roman civitas on all such peregrini as were members of some political community. The only peregrini left were the peregrini dediticii, i.e. aliens whose community had been destroyed and who had therefore no place which they could claim as their home and where they were entitled to reside.

§ 22. Midway between the citizens and non-citizens stand the Latins. From the oldest times the Latin allies of Rome, i.e. the members of the town-communities of Latium, had had the same private law and marriage law as the Romans. It was, in fact, Latin private law and Latin marriage law, and Roman law was merely one particular manifestation of it. In their capacity, then, as allies of Rome who were governed by the same law, the Latins also enjoyed the jus commercii and jus connubii in Rome. But of course they did not, in early times, possess the public rights of a citizen (jus suffragii and jus honorum) in regard to the Roman community. The effect of the powerful interest, however, which soon came to attach to the public privileges of a Roman citizen was that, in consequence of the Social war, first the Latin allies and then all the Italian communities were granted the Roman civitas, including, therefore, the public rights of a Roman citizen. Henceforward there are no more Latins in the old sense of the word, i.e. persons who are *born* Latins, but only, in the first place, Latin colonists, 'Latini coloniarii,' i.e. the free inhabitants of a colony founded with the jus Latii, or of a country upon which the jus Latii has been conferred (Vespasian, for instance, bestowed the Latin franchise on the whole of Spain)[2]; and in the second place, Latin freedmen, 'Latini Juniani' (v. p. 111). These two classes of Latins of the new and artificial type—persons who have been *made* Latins—only possess the jus commercii, and not the jus connubii, and the Latini Juniani are restricted even with regard to

[2] There are two forms of the jus Latii, the 'Latium minus,' which is the older and the usual form, and the 'Latium majus,' which probably only dates from Hadrian. In the communities which have the Latium minus only the officials of the community acquire the Roman civitas, in the communities which have the Latium majus, it is extended to the decuriones, or members of the communal council. The object of introducing the majus Latium was to encourage applications for the office of decuriones, the heavy expenses and responsibilities connected with which had made it difficult—ever since the beginning of the second century—to obtain the requisite number of persons ready to act. Gajus I. 96. O. Hirschfeld, *Zur Geschichte des latinischen Rechts* (Festschrift für d. archäolog. Institut in Rom, Vienna, 1879). On the other hand, the bestowal of the jus Italicum on a community of cives (a colony or a municipium) means that the community in question thereby acquires the privileges of a colonia Italica (i.e. an old colony of Roman citizens endowed with full legal rights), that its soil is therefore exempt from the land-tax and capable of quiritary ownership, in other words, is placed on the same footing as the fundus Italicus (cp. § 51, ii). Heisterbergk, *Name und Begriff des jus Italicum* (1885).

the commercium: they only have the commercium inter vivos, not the commercium mortis causa. A Latinus Junianus can neither make a will nor can he take anything under a will. When he dies, his property reverts to his master as though he had remained his slave all the time. § 22.

The privilege conferred by Caracalla included the Latini coloniarii. From the very outset, the grant of the jus Latii was intended to prepare the Latin communities and districts for receiving the full Roman civitas. Thus after Caracalla the only Latins left are the Latini Juniani, who, not being members of any political community, were excluded from the grant of Roman citizenship.

It was Justinian's aim to sweep away the entire antithesis between jus civile and jus gentium. With a view to this purpose he formally abolished the Latina libertas of the Juniani and the peregrina libertas of the dediticii—conditions which had long lost all practical importance both in private and in public law; in the former, in consequence of the fusion of jus civile and jus gentium; in the latter, in consequence of the rise of absolutism and the annihilation of the political rights incident to citizenship. The old legal distinctions had long been displaced by well-marked social distinctions of class. Every free subject of the Roman empire was now, as such, a Roman citizen. From a legal point of view, but one antithesis remained, viz. that between freemen and slaves. The distinction between citizens and non-citizens had vanished. In place of citizens of local communities we have citizens of an empire. And, at the same time, imperial citizenship had found its legal counterpart in an imperial law, uniform in all its parts. Corresponding to the universal citizenship of all within the Roman orbis terrarum, a universal law had been developed available for the world in general.

Ulp. tit. 19 § 5: Commercium est emendi vendendique invicem jus.

Ulp. tit. 5 § 3: Conubium est uxoris jure ducendae facultas.

Gaj. Inst. I § 14: Vocantur autem peregrini dediticii hi, qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde victi se dediderunt.

Gaj. eod. § 23: Non tamen illis (i.e. the Latini Juniani) permittit lex Junia vel ipsis testamentum facere, vel ex testamento alieno capere, vel tutores testamento dari.

§ 22. Gaj. eod. III § 56 : . . . admonendi sumus . . . eos, qui nunc Latini Juniani dicuntur, olim ex jure Quiritium servos fuisse, sed auxilio praetoris in libertatis forma servari solitos ; unde etiam res eorum peculii jure ad patronos pertinere solita est ; postea vero per legem Juniam eos omnes, quos praetor in libertate tuebatur, liberos esse coepisse et appellatos esse Latinos Junianos ; Latinos ideo, quia lex eos liberos perinde esse voluit atque si essent cives Romani ingenui, qui ex urbe Roma in Latinas colonias deducti Latini coloniarii esse coeperunt.—Legis itaque Juniae lator . . . necessarium existimavit, ne beneficium istis datum in injuriam patronorum converteretur, cavere voluit, ut bona eorum proinde ad manumissores pertinerent, ac si lex lata non esset : itaque jure quodammodo peculii ad manumissores ea lege pertinent.

§ 23. *Paterfamilias and Filiusfamilias.*

§ 23. Every Roman citizen is either a paterfamilias or a filiusfamilias, according as he is free (homo sui juris) or not free from paternal power (homo alieni juris). Paterfamilias is the generic name for a homo sui juris, whether man or woman, child or adult, married or unmarried ; filiusfamilias is the generic name for a homo alieni juris, whether son or daughter, grandson or granddaughter, and so on.

As regards public law the distinction between paterfamilias and filiusfamilias is of no importance. A filiusfamilias, provided he has all other necessary qualifications, is as much entitled to vote in the comitia and to be elected consul as a paterfamilias.

The effect of the distinction is confined to private law. True, the filiusfamilias is entitled to the jus commercii and jus connubii as much as the paterfamilias, for he is as much a Roman citizen as the paterfamilias. By civil law, therefore, the son can make contracts, acquire ownership[1], be instituted testamentary heir, contract a valid

[1] Thus, he may use mancipatio, but not in jure cessio, because it was part of the procedure in in jure cessio (sup. p. 31) that the party should claim *ownership* 'in jure.' But according to the old law a filiusfamilias, being a homo alieni juris, is incapable of holding ownership (v. infra).

marriage, &c. But whatever a filiusfamilias acquires he acquires for the paterfamilias. Whatever rights he acquires, be they rights of ownership or obligatory rights, nay, the very marital powers over his own wife and the paternal power over his own children vest not in him, but in his father. For according to early Roman law there exists in every Roman household but one ownership, one marital and one paternal power, viz. that of the paterfamilias. It is only the debts of a filiusfamilias which accrue, not to his father, but to himself. In other words, a filiusfamilias has passive, but no active proprietary capacity. § 23.

But during the empire the filiusfamilias gradually acquired an active proprietary capacity. Soldiers were the first to obtain it. Whatever a filiusfamilias miles acquired as a soldier (bona castrensia), he acquired for himself and not for his father. Public officials were the next to obtain the same privilege. Whatever a filiusfamilias earned in the civil service, or as an advocate, or acquired by gift from the emperor (bona quasi castrensia), belonged to himself and not to his father. The capacity to acquire property was ultimately extended to every filiusfamilias. Whatever a filiusfamilias acquires not from his father, but from his mother or some stranger (bona adventicia), belongs to himself as owner, subject however to his father's right to manage it, and subject also to his father's usufruct therein. Thus, according to the law in Justinian's time, the only person from whom the filiusfamilias is unable to acquire anything is his father. Whatever a filiusfamilias receives from his father remains in the ownership of his father, even though the latter may allow him to dispose of the property (peculium profecticium). Cp. infra, § 88.

L. 195 § 2 D. de V. S. (50, 16) (Ulpian.): Pater autem familias appellatur, qui in domo dominium habet; recteque hoc nomine appellatur, quamvis filium non habeat: non enim solam personam ejus, sed et jus demonstramus. Denique et pupillum patremfamilias appellamus, et cum paterfamilias moritur, quotquot capita ei subjecta fuerint, singulas familias incipiunt habere; singuli enim patrumfamiliarum nomen subeunt. Idemque eveniet et in eo, qui emancipatus est: nam et hic sui juris effectus propriam familiam habet.

§ 23. GAJ. Inst. II § 87: Igitur, quod liberi nostri, quos in potestate habemus, . . . mancipio accipiunt vel ex traditione nanciscuntur, sive quid stipulentur vel ex aliqualibet causa adquirunt, id nobis adquiritur: ipse enim, qui in potestate nostra est, nihil suum habere potest.

§ 24. *Capitis Deminutio.*

§ 24. Capitis deminutio is the destruction of the 'caput' or legal personality. Capitis deminutio, so to speak, wipes out the former individual and puts a new one in his place, and between the old and the new individual there is, legally speaking, nothing in common. A juristic personality may be thus destroyed in one of three ways:

(1) by loss of the status libertatis. This is the capitis deminutio maxima;

(2) by loss of the status civitatis. This is the capitis deminutio media (magna);

(3) by severance from the agnatic family. This entails capitis deminutio minima.

Capitis deminutio maxima means the loss of a man's *entire* juristic personality. Capitis deminutio media and minima merely mean the loss of the particular juristic personality which a man has hitherto possessed.

To undergo capitis deminutio maxima is to forfeit one's liberty. A Roman civis may, like others, become a slave, e.g. if he is condemned for a crime, or taken a prisoner of war. If, however, a Roman citizen returns from captivity, he becomes, at the moment of his return, a Roman citizen again and recovers all those rights which he had forfeited by his capitis deminutio in just the same manner as though he had never lost them. He becomes once more the paterfamilias of his children, the owner of his property, the creditor of his debtors, and so on. In a word, he becomes the subject of all the legal relations which his captivity had extinguished for him, to the same extent as though he had never been a prisoner of war at all. This is the nature of the so-called 'jus postliminii.'

Let us suppose, however, that the Roman civis in question does not return, but dies in captivity. At the time of his death he is clearly not a civis Romanus, but a slave. Is then the will which he executed at home, before he was taken prisoner, void or not? And, to go a step further, since a slave cannot have any heirs, can he (the prisoner) have heirs or not? All these difficulties were solved by the so-called 'fictio legis Corneliae,' by which a Roman civis, dying in captivity, is assumed by a fiction to have died a Roman citizen; consequently (argued the jurists), he shall be deemed to have died at the very moment of being taken prisoner. § 24.

§ 5. I. quib. mod. jus pot. solv. (1, 12): Postliminium fingit eum, qui captus est, semper in civitate fuisse.

L. 16 D. de captiv. (49, 15) (Ulpian.): Retro creditur in civitate fuisse, qui ab hostibus advenit.

L. 12 D. qui test. fac. (28, 1) (Julian.): Lege Cornelia testamenta eorum, qui in hostium potestate decesserint, perinde confirmantur, ac si hi, qui ea fecissent, in hostium potestatem non pervenissent; et hereditas ex his eodem modo ad unumquemque pertinet.

L. 18 D. de captiv. (49, 15) (Ulpian.): In omnibus partibus juris is, qui reversus non est ab hostibus, quasi tunc decessisse videtur, cum captus est.

Capitis deminutio media (or magna) is loss of citizenship unaccompanied by loss of liberty; it occurs e. g. when a Roman citizen emigrates to a Latin colony. But in Justinian's time, since every member of the Roman empire who was free was, at the same time, a Roman citizen, media capitis deminutio is only possible in the case of banishment, i. e. expulsion from membership of the empire[1].

§ 2. I. de cap. min. (1, 16): Minor sive media est capitis deminutio, cum civitas quidem amittitur, libertas vero retinetur. Quod accidit ei, cui aqua et igni interdictum fuerit, vel ei, qui in insulam deportatus est.

[1] Cp. J. M. Hartmann, *De exilio apud Romanos, dissertatio inauguralis* (Berolini, 1887). The same writer in the *ZS. der Sav. St.*, vol. ix. p. 42 ff.

§ 24. Severance from one's agnatic family also operates as a capitis deminutio (viz. minima), a destruction of one's personality. For it is in the family that the essence and force of a legal personality lie. To change one's family, therefore, is to change one's personality; it means the destruction of the old personality and the birth of a new one.

The word 'family,' however, in the legal signification of the term, means, according to the civil law of Rome, something very different from what we are accustomed to associate with the term. By family we mean the aggregate of all persons who are connected by ties of blood-relationship, the aggregate of all members of one and the same *stock*. But a Roman family, within the meaning of the jus civile, means the aggregate of all those who belong to one and the same *household*, who are subject to one and the same 'domestic power' (patria potestas), or, at any rate would be thus subject, if the common ancestor were still living. This is what is meant by the term 'agnatio.' And the civil law recognizes no other kind of relationship but agnatio; it knows nothing of cognatio or blood-relationship. Thus the family of the Roman civil law means the agnatic family (v. infra, § 78). A peculiar characteristic of this agnatic family is that it can be changed. Blood-relationship cannot be destroyed, and a cognatic family, or family in the modern sense, does not admit of change. But a person can separate himself from an agnatic family, because he can separate himself from the household, i. e. from the community of those who stand under the same patria potestas. And this is what happens to a daughter who contracts a marriage and thereby enters the marital (i.e. domestic) power (manus) of her husband ('in manum conventio'), or of the person under whose patria potestas her husband stands. Having passed from one patria potestas to another, she has thereby changed her family (her agnatic family, namely); she has changed her entire circle of relations (agnatic relations, namely); in a word, she has undergone a complete change of personality. The same thing happens to a filiusfamilias, when his father sells him into bondage (mancipium, § 88), or gives him in adoption (datio in adoptionem); and again to a person sui juris, when he suffers himself to be adopted by another (arrogatio);

or lastly, to a filiusfamilias, when his father emancipates him from the paternal power (emancipatio). And it is to be noted that in spite of the fact that the emancipatus actually improves his outward position by becoming a paterfamilias instead of a filiusfamilias, he nevertheless undergoes capitis deminutio, because the rupture of his agnatic ties involves the destruction of his previous legal personality and the creation of a new one. § 24.

Capitis deminutio minima, then, means the severance from one's agnatic relationship, and it occurs in five cases, viz. in the case of 'mancipio dare,' of 'in manum conventio,' of 'datio in adoptionem,' of 'arrogatio,' and of 'emancipatio.'

There were two further incidents of capitis deminutio minima which flowed as consequences from the destructive effect which capitis deminutio minima had in common with the other forms of capitis deminutio. Firstly, it was a rule of civil law that capitis deminutio minima extinguished the contractual debts of the capite minutus. The praetor, however, subsequently restored to the creditors their rights of action by means of in integrum restitutio. Secondly, it extinguished all personal servitudes to which the capite minutus had been entitled, i. e. all such jura in re aliena as had belonged to him for life (infra, § 56. I). This latter rule was only abolished by Justinian. According to the law as laid down in the Corpus juris personal servitudes are only extinguished by capitis deminutio maxima and media.

Gaj. Inst. I § 162: Minima est capitis deminutio, cum et civitas et libertas retinetur, sed status hominis commutatur. Quod accidit in his, qui adoptantur, item in his, quae coemptionem faciunt, et in his, qui mancipio dantur, quique ex mancipatione manumittuntur: adeo quidem, ut quotiens quisque mancipetur aut manumittatur, totiens capite deminuatur.

L. 11 D. de cap. min. (4, 5) (Paulus): Capitis deminutionis tria genera sunt: maxima, media, minima; tria enim sunt, quae habemus: libertatem, civitatem, familiam. Igitur cum omnia haec amittimus, hoc est libertatem et civitatem et familiam, maximam esse capitis deminutionem. Cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis deminu-

§ 24. tionem; cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat.

§ 25. *Existimationis Minutio.*

§ 25. The term 'honour' refers, in the first instance, only to social relations. To be 'honoured' is to be allowed one's full worth in society. Society treats those as entitled to honour who act in adherence to its views. The award or denial of honour, in other words, of social worth, is the sanction by means of which society enforces on individuals not merely the commands of law and morality, but more specifically the decrees of mere usage which may conceivably run counter to law and morality. The particular kind of conduct which society requires from the individual assumes different forms in reference to the different sections into which society is divided, and it is in this sense that we speak of the honour of a particular class, of military honour, professional honour, and so on.

The effect which social relations and social views produce upon the law, finds expression in the legal rules concerning 'existimatio' or 'civic honour.' The law yields, to some extent, to the judgment pronounced by society and, in certain circumstances, imposes legal disabilities on persons whom society has declared to fall short of the standard it requires. Civic honour (in the legal sense) means full qualification in the eye of the law. Loss of honour (in the legal sense) means partial disqualification in the eye of the law.

The civic honour of a civis Romanus may be destroyed (consumtio existimationis), viz. by capitis deminutio maxima or media; or it may be merely impaired (minutio existimationis). And it is in this last and narrower sense that the expression 'loss of civic honour' is technically applied. Minutio existimationis may be defined as the impairment of a man's civic honour which, without producing capitis deminutio (in other words, without destroying his previous personality), merely operates to diminish his personal qualifications in the eye of the law.

In the Roman civil law, existimationis minutio only occurs: (1)

in the cases determined by popular enactments[1]; (2) in consequence of a reprimand from the censor. But here again the jus honorarium outstripped the civil law. Towards the close of the republic the censor ceased to exercise his old functions and the vacancy thus created was supplied by the praetor. For the praetorian edict was concerned with persons whose civic dignity was impaired in so far as their disabilities in regard to judicial proceedings came into question. Thus the praetor in his edict enumerated those to whom, as persons of tarnished reputation, he would refuse the full jus postulandi, i. e. to whom he would deny the right to make motions in court (postulare) otherwise than on behalf of themselves or certain close relations. In another part of the edict he specified those to whom, as persons of tarnished reputation, he declined to grant the right of being represented by an agent in an action before him[2]. But in thus denying to certain parties full legal capacity in judicial proceedings (including, *inter alia*, the unrestricted jus postulandi) the praetor did not directly pronounce them 'infames.' He had neither occasion nor power formally to curtail the civic honour which a person enjoyed. But, says Gajus, 'those whom the praetor places under such disabilities *we call infamous*[3].' It was, then, in those lists contained in the praetorian edict that the views which society took of the cases of existimationis minutio found legal expression and were, so to speak, codified; imperfectly, it is true, but nevertheless in such a way as to be decisive of the future attitude of the law towards civic honour. And it was from these sections of the praetorian edict that Justinian's compilers took their catalogue of cases of existimationis minutio. § 25.

There were, more particularly, two groups of cases which were contrasted with one another, the cases of 'infamia immediata' and of 'infamia mediata.' Infamy was said to be 'immediate,' if it attached to a person at once, ipso jure, on the commission of some

[1] Thus e. g. the Twelve Tables (viii. 22) declared: qui se sierit testarier libripensve fuerit, ni testimonium fatiatur, improbus intestabilisque esto.

[2] Karlowa, *ZS. für RG.*, vol. ix, p. 222 ff.; Lenel, *ZS. der Sav. St.*, vol. ii. p. 54 ff.

[3] Gaj. iv. 182 (Studemund, ed. 2): Nec tamen ulla parte edicti id ipsum nominatim exprimitur, ut aliquis ignominiosus sit; sed qui prohibetur et pro alio postulare et cognitorem dare procuratoremve habere, item procuratoris aut cognitoris nomine judicio intervenire, ignominiosus esse dicitur. v. infra, note 5.

§ 25. act which deserved to be visited with social disgrace. Thus it attached to persons engaged in a disreputable trade, to soldiers ignominiously discharged from military service, to persons in the relation of a double marriage or double betrothal. On the other hand, infamy was said to be 'mediate,' if it did not attach directly, but only after a court of law had passed judgment on the delinquent on the ground of some act which deserved to be visited with social disgrace. Such was the effect above all things of every criminal sentence touching life, limb or liberty. A similar result however followed condemnation in certain civil cases, more especially if judgment were given against a person in a civil action on account of a dishonourable breach of duty (e.g. as guardian, partner, depositary, agent). Those civil actions in which condemnation entails infamy are called 'actiones famosae.'

No codification of the law of honour can, in the nature of things, be complete. It was necessary, therefore, to allow the Roman judges a discretionary power to take account of such cases of infamy as had not been specified in any statute or the praetorian edict. Looked at from this point of view, there were two kinds of existimationis minutio, 'infamia' and 'turpitudo.' In the case of 'infamy' the conditions under which it should attach were fixed by the law, viz. by statutes and the praetorian edict. In the case of so-called 'turpitude,' the conditions under which it should attach were fixed, not by the law, but by the free discretion of the judge acting, in each individual case, on the verdict of public opinion, in other words, on the verdict of society.

Both these forms of minutio existimationis (viz. infamia and turpitudo) produce this result that the judge, acting on his own discretion, may take them into account, wherever the character of the person affected is concerned. He may hesitate, for example, before admitting such a person as a witness or allowing him to act as a guardian. Or again, if an infamis or turpis is instituted in a will, the judge may admit the brothers and sisters of the deceased to the querela inofficiosi testamenti (§ 100). The following effects, moreover, are peculiar to infamy: it extinguishes the jus suffragii and the jus honorum; it restricts the jus connubii (by disqualifying

the infamis from marrying any free-born person, v. § 86); and it also restricts the right to make motions in court on behalf of others (v. supra). But these special disqualifications incident to infamy have ceased to exist in Justinian's time[4]. As far as a man's personality, as such, is concerned, the only effect, under Justinian's law, both of 'infamy' and 'turpitude' is that the persons affected are liable to be subjected to certain disabilities by the judge in the exercise of his judicial discretion. § 25.

L. 5 § 2 D. de extr. cogn. (50, 13) (CALLISTRATUS): Minuitur existimatio, quotiens, manente libertate, circa statum dignitatis poena plectimur, sicuti cum relegatur quis, vel cum ordine movetur, vel cum prohibetur honoribus publicis fungi, vel cum plebejus fustibus caeditur, vel in opus publicum datur, vel cum in eam causam quis incidit, quae edicto perpetuo infamiae causa enumeratur. § 3: Consumitur vero, quotiens magna capitis minutio intervenit.

L. 1 D. de his qui not. inf. (3, 2): Praetoris verba dicunt: INFAMIA NOTATUR[5] QUI AB EXERCITU IGNOMINIAE CAUSA AB IMPERATORE EOVE, CUI DE EA RE STATUENDI POTESTAS FUERIT, DIMISSUS ERIT; QUI ARTIS LUDICRAE PRONUNTIANDIVE CAUSA IN SCAENAM PRODIERIT; QUI LENOCINIUM FECERIT; QUI IN JUDICIO PUBLICO CALUMNIAE PRAEVARICATIONISVE CAUSA QUID FECISSE JUDICATUS ERIT; QUI FURTI, VI BONORUM RAPTORUM, INJURIARUM, DE DOLO MALO ET FRAUDE SUO NOMINE DAMNATUS PACTUSVE ERIT; QUI PRO SOCIO, TUTELAE, MANDATI, DEPOSITI SUO NOMINE NON CONTRARIO JUDICIO DAMNATUS ERIT; QUI EAM, QUAE IN POTESTATE EJUS ESSET GENERO MORTUO, CUM EUM MORTUUM ESSE SCIRET, INTRA ID TEMPUS, QUO ELUGERE VIRUM MORIS EST, ANTEQUAM VIRUM ELUGERET, IN MATRIMONIUM COLLOCAVERIT, EAMVE SCIENS QUIS UXOREM DUXERIT NON JUSSU EJUS,

[4] The jus suffragii and the jus honorum had lost all practical meaning, the prohibition on marriages had been abolished, and the judge was given entire discretion as to whether he would allow a person to make a motion in court or not (§ 11 I. de except. 4, 13).

[5] These first two words are due to Justinian's compilers (v. Lenel, *loc. cit.*). Lenel's conjectures have been brilliantly verified by the text of Gajus iv. § 182 (v. note 3) which has only now been definitely ascertained. As to the restoration of the original words and context of the praetorian edict here under discussion v. Lenel, *Edictum perpetuum*, pp. 62, 63.

§ 25. IN CUJUS POTESTATE EST; ET QUI EUM, QUEM IN POTESTATE HABERET, EAM, DE QUA SUPRA COMPREHENSUM EST, UXOREM DUCERE PASSUS FUERIT; QUIVE SUO NOMINE NON JUSSU EJUS, IN CUJUS POTESTATE ESSET, EJUSVE NOMINE, QUEM QUAMVE IN POTESTATE HABERET, BINA SPONSALIA BINASVE NUPTIAS IN EODEM TMPORE CONSTITUTAS HABUERIT.

BOOK II.

THE LAW OF PROPERTY.

CHAPTER I.

General Part.

§ 26. *Introduction.*

We have defined a person (§ 20) as a subject endowed with proprietary capacity. The Law of Property, which we now proceed to discuss, determines the orbit of this proprietary capacity. § 26.

There are certain rules of law which apply, in an equal degree, to all proprietary rights. These are: firstly, the rules concerning juristic acts (by which proprietary rights may be created, transferred or extinguished); secondly, the rules concerning the protection of rights (i.e. the law of procedure). It is with these rules, which constitute the general part of the law of property, that we are, for the present, concerned.

I. JURISTIC ACTS.

§ 27. *The Conception of a Juristic Act and the Kinds thereof.*

It is a matter of observation that where a legal result is produced, such result may either be independent of the will of the person concerned (as when a right of action is barred by lapse of time) or § 27.

§ 27. again, it may be determined by the will of the person concerned, determined (that is to say) in one of two different senses: either in the sense that the law contravenes his will (as in the case of delicts), or in the sense that the law conforms with his will (as in the juristic acts). The juristic acts of private law are the means employed by a private person for the purpose of producing certain legal results affecting his proprietary position. In other words, when a private person expresses his will in such a way that the law annexes to such expression the result willed (and it is in this sense that the expression of the will is material for private law), we have a juristic act of private law. And juristic acts may be either unilateral, or bilateral (agreements), according as they give expression and effect to the will of one single person, or to the concordant wills of several persons.

A testament, for example, is a unilateral juristic act.

It follows from what we have said that an agreement, in the legal sense of the term, is any expression of consensus which produces a legal result.

The object of the consensus from which the agreement springs is susceptible of the greatest variations. Its object may be to produce an obligation—in which case we have an obligatory agreement or contract; or it may be to produce any other legal effect, e.g. the discharge of a debtor, the creation of a real right (by transfer of ownership, by giving a thing in pledge).

L. 1 § 2 D. de pactis (2, 14) (Ulpian.): Et est pactio duorum pluriumve in idem placitum et consensus[1].

[1] In spite of the wording of this comprehensive definition, the Roman conception of a pactum is a comparatively narrow one. It is confined to such agreements as appertain to the law of obligations (whether the object be to create or, as in the case of the pactum de non petendo, to extinguish an obligation). The Roman jurists do not treat agreements which lie outside the range of the law of obligations as agreements at all. (Cp. Pernice, *ZS. der Sav. St.* vol. ix. p. 195 ff.) The conception of an agreement, in the broad modern sense of the term (and it is in this sense that we have used it in the text) is far wider than that developed by the Roman jurists who were evidently influenced by the phraseology of the praetorian edict.

§ 28. *Requisites of a Juristic Act.*

§ 28. Every juristic act (sale, letting, &c.) consists of an expression of the will. Thus we always have two elements: (1) the will; (2) the expression.

1. The Will.

There can be no juristic act, if the person expressing the will is legally incapable of willing (e.g. if he is a lunatic), or if, in any other way, the will is demonstrably absent[1]. This is what happens, for instance, if both parties to an agreement consent to will something different from what they express. Their expressions indicate, say, a sale, but they are agreed that the transaction shall be understood as a gift. And so in all cases, where expressions are used having reference to some juristic act, but are used in such a manner (e.g. in jest or for purposes of instruction) as clearly to negative the existence of any intention to produce a legal result. The same thing happens when a mistake produces a result demonstrably different from that intended by the doer.

Where, however, the expression is unambiguous and there is no discoverable divergence between the inward will and the outward expression, the juristic act may, in some cases, be perfectly valid notwithstanding such divergence[2]. The leading illustration of such cases is what is known as 'mental reservation,' i.e. one party to an agreement intends, without the knowledge of the other, to will something different from what he expresses. In the same way, too, an unintentional divergence between the will and its expression may be immaterial, in the sense that the person concerned is legally bound by his expression. Thus, for example, if a man goes into a restaurant and has dinner, and subsequently declares (with perfect truth

[1] E. g. if the vendor, by mistake, asks for too low a price, and it appears at once from the surrounding circumstances that he is acting under the influence of a mistake. Cp. the *Annalen des Königl. Sächs. Oberlandesgerichts zu Dresden*, vol. ix. (1888), p. 528 ff.

[2] Hartmann, in *Jhering's Jahrbücher f. Dogmatik*, vol. xx. p. 1 ff.; also in the *Archiv für d. civilistische Praxis*, vol. lxxii. p. 161 ff. For a different view, see Eisele, *Jhering's Jahrbücher*, vol. xxv. p. 414 ff.; Enneccerus, *Das Rechtsgeschäft* (1888), p. 107 ff.

§ 28. perhaps) that he thought the dinner cost less than it actually did, such unintentional discrepancy between will and expression will be legally immaterial.

2. The Expression.

By 'expression' or 'manifestation' we mean the notification by one party to another of his will to produce a legal result. Thus it is not every notification that produces a juristic act, but only an expression of intention which is addressed to the other party concerned in the juristic act, e. g. to a person witnessing a will, or to a person with whom it is intended to conclude a contract. In regard to the form in which the will is expressed, juristic acts are said to be either formal or informal. They are formal, when the law prescribes the form in which the expression of the will is to be made, in default of which form such acts cannot be validly constituted. A will is an instance of a formal juristic act. Informal juristic acts (and most juristic acts are informal) are those in which the will may be expressed in any form whatever, by writing or speaking, by messenger, letter, or otherwise, nay, even without any direct act of communication at all (by a so-called 'tacit expression of will') where the act is done in such a way as to imply an intention[3]. All that is required in informal acts is that the will should be expressed in some manner or other.

> L. 3 D. de reb. dub. (34, 5) (Paulus): In ambiguo sermone non utrumque dicimus, sed id dumtaxat, quod volumus. Itaque, qui aliud dicit quam vult, neque id dicit, quod vox significat, quia non vult, neque id, quod vult, quia id non loquitur.

[3] The will can thus be manifested in one of two ways, either explicitly, by the mere act of notification, or tacitly, by actually doing that which is willed. As an instance of the latter kind we may take the case of a person accepting an inheritance by merely carrying out his intention of being heir to the deceased, e. g. by paying his debts. As to silence, in so far as it can be regarded, under the peculiar circumstances of the case, as tantamount to an expression of the will at all, it will constitute, as a rule, not a tacit, but an explicit manifestation of the will. The practical distinction between the two cases is expressed in the rule that where the will is manifested by an act of notification, such manifestation is not legally complete till the notification has reached the party to whom it is addressed; where, however, the will is manifested by the act of carrying it out, the manifestation is complete at once on the doing of the act.

§ 28.

L. 9 pr. D. de her. inst. (28, 5) (ULPIAN.): Quotiens volens alium heredem scribere alium scripserit in corpore hominis errans, veluti 'frater meus,' 'patronus meus,' placet, neque eum heredem esse, qui scriptus est, quoniam voluntate deficitur, neque eum, quem voluit, quoniam scriptus non est.

L. 57 D. de O. et A. (44, 7) (POMPONIUS): In omnibus negotiis contrahendis, sive bona fide sint sive non sint, si error aliquis intervenit, ut aliud sentiat puta qui emit aut qui conducit, aliud qui cum his contrahit, nihil valet, quod acti sit.

§ 29. *Motive, as affecting Juristic Acts.*

§ 29.

The general rule is that the motives from which juristic acts proceed are immaterial. It is therefore, as a rule, a matter of indifference whether a person has gained his object by the juristic act or not. If, for example, he buys a book, thinking it deals with one thing, whereas it really deals with another, the sale is nevertheless perfectly good. His motive is immaterial. Falsa causa non nocet.

Such is the general rule. There are nevertheless some exceptional cases where the motive is material in the eye of the law. These are the four cases of metus, dolus, error in substantia, and donatio.

I. Metus.

Metus occurs when a person is forced to a juristic act under the influence of fear arising from a threat. The threat is called 'vis compulsiva,' and is distinguished in this sense from 'vis atrox' or 'absoluta,' i. e. sheer physical force. The object of the threat is to secure the conclusion of the juristic act, whatever it may be, a transfer of ownership, a promise to pay money, and so forth. Roman civil law, in such cases, upholds the transaction as perfectly valid and binding, but the praetor supplies the person intimidated with the means of cancelling, by process of law, the effects of the act which was thus forced upon him. These means are, firstly, the actio quod metus causa, an action for the recovery of property available against anyone who is actually the richer, at the time, by the transaction in question; secondly, the exceptio quod metus

§ 29. causa, i. e. a special defence allowed to a person who is sued on an act he performed under the influence of fear. Metus is, thirdly, a 'justa causa' for the granting of 'in integrum restitutio' (§ 43).

L. 1 pr. D. quod met. c. (4, 2): Ait praetor: QUOD METUS CAUSA GESTUM ERIT, RATUM NON HABEBO.

L. 14 § 3 D. eod. (ULPIAN.): In hac actione non quaeritur, utrum is, qui convenitur, an alius metum fecit: sufficit enim hoc docere, metum sibi illatum vel vim, et ex hac re eum, qui convenitur, esti crimine caret, lucrum tamen sensisse.

II. Dolus.

Dolus occurs when one party to an agreement is induced to conclude a juristic act by means of the deliberate deception practised on him by the other. One party, in short, is defrauded by the other. Here again the civil law upheld the transaction as perfectly valid and binding, but the praetor granted certain legal remedies against the fraudulent party by means of which the civil law effects of the transaction were nullified. These remedies were, firstly, the actio doli and, secondly, the exceptio doli. The object of the actio doli (which was merely a subsidiary remedy, applicable only if there were no other kind of legal redress) was to obtain indemnification for all loss resulting from the juristic act, involving, in some cases, a rescission of the whole transaction. It only lay against the defrauding party himself, or his heir, but not against third parties who had profited by the transaction. The exceptio doli was a special defence to an action taken by the defrauding party, or his legal successor, on the transaction in question. There was also, thirdly, an 'in integrum restitutio propter dolum' (§ 43).

L. 1 § 1 D. de dolo (4, 3): Verba autem edicti talia sunt: QUAE DOLO MALO FACTA ESSE DICENTUR, SI DE HIS REBUS ALIA ACTIO NON ERIT ET JUSTA CAUSA ESSE VIDEBITUR, JUDICIUM DABO.

III. Error in Substantia.

'Error in substantia' is a mistake concerning some essential quality of the subject-matter of the agreement, i. e. concerning some quality which places the article for commercial purposes in a

different category of merchandise. Thus it would be an error in substantia, if I were to mistake a gilt vessel for one of solid gold, vinegar for wine, or a female slave for a male one. In all these cases the subject-matter of the agreement is specifically indicated. Both parties mean precisely the same individual thing. There is, in other words, complete 'consensus in corpore.' Thus 'error in substantia' is the very opposite of 'error in corpore,' for the former presupposes complete consensus as to the subject-matter of the agreement, whereas in the latter there can be no consensus, because each party is thinking of a different subject-matter. In the case of an error in substantia, one party can be proved to have believed the subject-matter to possess some essential quality which in truth it does not possess. There need not be any fraud on the part of the other; he may be labouring under precisely the same mistake. The mistake, such as it is, is a mistake of motive, a mistake which gives rise to the necessary will, the consensus, in a word, to the juristic act, in precisely the same manner as metus and dolus in the previous instances. The juristic act is complete, and on principle, again, perfectly valid and binding. Falsa causa non nocet. In certain exceptional cases however, where there is a bilateral contract, a person, who, under the influence of an excusable error in substantia, becomes a party to such a contract (e. g. a sale), may impeach the transaction on the ground of such error in substantia. In the great majority of juristic acts (traditio, pledge, promise of bounty, depositum, commodatum, &c.) an error in substantia is, like any other motive, immaterial, as far as the legal validity of the act is concerned. Its legal relevancy is confined to obligatory transactions with promises of mutual consideration, such as sale, letting and hiring, &c. And when we say that error in substantia is material in such cases, we do not mean that it vitiates the entire transaction, nor again that there is any particular legal remedy for impeaching it. What we mean is merely, that in virtue of the bona fides which governs all such transactions, an error in substantia must necessarily modify the effects which they produce, and modify them, not merely according to praetorian law, but ipso jure, i. e. according to the civil law. Where I clearly intend to purchase

§ 29.

§ 29. wine, but through some excusable error purchase poison, it would be inconsistent with the requirements of good faith which govern the contract of sale, if I were simply condemned to pay the price, and were debarred from demanding a rescission of the sale,—unless indeed there are particular circumstances which make such a treatment of the case unfairly prejudicial to the vendor. For it is of the essence of every contract of sale, as well as of all other transactions which generate bilateral obligations (§ 63), that the parties are not simply bound to perform what they actually promised, but are merely obliged to act up to the requirements (the full requirements, however) of good faith and honesty in the mutual dealings between man and man[1].

IV. Donatio.

A gift (donatio) is an act of bounty by which one person increases the property of another. Early Roman law had already subjected the power to make gifts to certain restrictions by the lex Cincia, 204 B. C. In Justinian's law transactions which have for their object the making of a gift are, on account of this motive, governed by the following rules :—

1. Gifts between husband and wife are void (§ 81, end).

2. Gifts exceeding a certain maximum (fixed by Justinian at 500 solidi, about £234) are void to the extent of such excess, unless the donor registers the gift in court (insinuatio), thereby formally manifesting his intention of bounty.

3. Gifts are revocable on the ground of gross ingratitude on the part of the donee, e.g. if he compasses the donor's death, or scandalously libels him.

The donatio mortis causa is a gift conditional on the donee surviving the donor. In regard to the rules just stated as well as in some other respects, donationes mortis causa are not governed by the law applicable to donationes, but by the law of legacies (§ 105).

L. 1 pr. D. de donat. (39, 5) (JULIAN.): Donationes complures sunt. Dat aliquis ea mente, ut statim velit accipientis fieri, nec ullo casu ad se reverti, et propter nullam aliam causam

[1] Cp. Zitelmann, *Irrtum und Rechtsgeschäft* (1879), p. 560 ff.

facit, quam ut liberalitatem et munificentiam exerceat: haec proprie donatio appellatur. § 29.

§ 1 I. de donat. (2, 7): Mortis causa donatio est, quae propter mortis fit suspicionem: cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is, qui accepit; sin autem supervixisset, qui donavit reciperet, vel si eum donationis poenituisset, aut prior decesserit is, cui donatum sit. Hae mortis causa donationes ad exemplum legatorum redactae sunt per omnia . . . . .; a nobis constitutum est, ut per omnia fere legatis connumeretur . . . Et in summa, mortis causa donatio est, cum magis se quis velit habere quam eum, cui donatur, magisque eum, cui donat, quam heredem suum.

§ 30. *The Qualifications of a Juristic Act.*

The normal effects of a juristic act may be modified by a collateral agreement between the parties to the act. The modifications which the parties thus agree to engraft on the act are what we call the 'qualifications' of a juristic act. Of such qualifications three are the most important: condicio, dies, modus. § 30.

I. Condicio.

A 'condition' is an uncertain future event on the occurrence of which the parties agree to make the effect of the transaction dependent. A condition is 'suspensive' when the commencement, and 'resolutive' when the termination of the operation of the act is made to depend on its occurrence. On the fulfilment of a suspensive condition, the juristic act produces ipso jure its normal legal results, effecting a transfer of ownership, creating a liability, &c., as the case may be. And, conversely, on the happening of a resolutive condition the normal effects of the act cease ipso jure.

Uncertainty is the peculiar characteristic of a condition in the legal sense. Hence the so-called 'condiciones in praesens vel in praeteritum relatae,' the impossible and the necessary conditions are not, in the strict legal sense, conditions at all.

§ 4 I. de V. O. (3, 15): Sub condicione stipulatio fit, cum in aliquem casum differtur obligatio, ut, si aliquid factum fuerit

§ 30. vel non fuerit, stipulatio committatur, veluti: SI TITIUS CONSUL FUERIT FACTUS, QUINQUE AUREOS DARE SPONDES?

§ 6 eod.: Condiciones, quae ad praeteritum vel ad praesens tempus referuntur, aut statim infirmant obligationem, aut omnino non differunt, veluti: SI TITIUS CONSUL FUIT, VEL SI MAEVIUS VIVIT, DARE SPONDES?

L. 9 § 1 D. de novat. (46, 2) (ULPIAN.): Qui sub condicione stipulatur, quae omnimodo exstatura est, pure videtur stipulari.

II. Dies.

'Dies' is a future event which is certain to happen, and on the occurrence of which the operation of the juristic act is either to commence (dies a quo) or to terminate (dies ad quem).

§ 2 I. de V. O. (3, 15): Id autem, quod in diem stipulamur, statim quidem debetur, sed peti prius quam dies veniat, non potest.

III. Modus.

'Modus' (in the technical sense) is a term applied in the case of gifts or testamentary dispositions, whereby the person benefited is required and bound to devote the property he receives, or the value thereof, in whole or in part, to a specified purpose.

L. 17 § 4 D. de cond. et dem. (35, 1) (GAJUS): Quod si cui in hoc legatum sit, ut ex eo aliquid faceret, veluti monumentum testatori, vel opus, aut epulum municipibus faceret, vel ex eo ut partem alii restitueret, sub modo legatum videtur.

L. 80 eod. (SCAEVOLA): . . . nec enim parem dicemus eum, cui ita datum sit: SI MONUMENTUM FECERIT, et eum, cui datum est: UT MONUMENTUM FACIAT.

§ 31. *Capacity of Action.*

§ 31. 'Capacity of action,' in the wider sense, is the ability to act in such a manner as to produce a legal result. For the law takes no notice of any act as such, unless it be the act, i. e. a manifestation of the will (whether lawful or unlawful), of a capacitated person.

Capacity of action, in the narrower sense (and it is in this sense that the conception is of special importance in private law), means

the capacity to do acts of a particular kind, the capacity, namely, to conclude juristic acts. In this sense, we distinguish three degrees of capacity of action; total absence of capacity, partial absence of capacity, full capacity. § 31.

I. The following persons are incapacitated from all juristic acts:

(*a*) the 'infans,' or child who has not yet completed its seventh year;

(*b*) the 'furiosus,' or person of unsound mind.

II. The following persons are incapacitated from some juristic acts, but are capable of others:

(*a*) the 'impubes,' or child who has completed its seventh, but not yet completed (if a boy) his fourteenth, (if a girl) her twelfth year;

(*b*) the 'prodigus,' or prodigal who has been placed under the control of a curator.

In the early Roman law women were also capable of some juristic acts only (§ 90, ii.).

The legal position of persons of the second class is as follows. They are capable of such juristic acts as result in an improvement of their proprietary position, but they are incapable of juristic acts which operate to alienate property or impose a liability. If therefore a person of imperfect capacity enters on a transaction which operates both to confer a right and impose an obligation, he acquires the right, but cannot himself be sued on the transaction. Thus, if he contracts a loan, he becomes owner of the coins given him under the loan, but cannot be sued on the loan, as such. All he can be compelled by action to do—and in this respect he is in precisely the same position as a person who is completely incapacitated—is to restore the property to the extent to which he is, at present, enriched by it (§ 70, i.). If the transaction is one where the parties are under mutual obligations to one another (e. g. a sale), he is entitled to exact performance from the other party without being himself compellable by action to do his part. Hence such transactions are called 'negotia claudicantia.'

A guardian may act in place of a person of imperfect capacity.

§ 31. Or, if the person be an impubes, he may also conclude such acts himself as operate to alienate property or impose a liability, if assisted by the presence of the guardian (tutoris auctoritatis interpositio). Cp. § 90.

pr. I. de auct. tut. (1, 21): Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria: ut ecce, si quid dari sibi stipuletur, non est necessaria tutoris auctoritas; quod si aliis pupilli promittant, necessaria est. Namque placuit, meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriorem vero non aliter, quam tutore auctore. Unde in his causis, ex quibus mutuae obligationes nascuntur, in emptionibus venditionibus, locationibus conductionibus, mandatis, depositis, si tutoris auctoritas non interveniat, ipsi quidem, qui cum his contrahunt, obligantur, at invicem pupilli non obligantur.

§ 2 eod.: Tutor autem statim in ipso negotio praesens debet auctor fieri, si hoc pupillo prodesse existimaverit; post tempus vero aut per epistulam interposita auctoritas nihil agit.

L. 6 D. de V. O. (45, 1) (Ulpian.): Is, cui bonis interdictum est, stipulando sibi adquirit, tradere vero non potest vel promittendo obligari: et ideo nec fidejussor pro eo intervenire poterit, sicut nec pro furioso.

III. All persons not specified in classes (i) and (ii), have full legal capacity for all juristic acts, including therefore the capacity to incur contractual liabilities of their own. According to Roman law, then, minors who are above the age of puberty, but under twenty-five years (puberes minores xxv annis) enjoy full legal capacity. Such minors are, however, allowed to apply for a curator, and once such a curator is appointed, the 'minor curatorem habens' ceases, in spite of his full capacity of action, to have any power *to dispose* of his property. He is deprived of his right to manage his own property, because the management of it has been transferred to his curator. True, he can, by his own will, conclude juristic acts of any kind, including such as effect an alienation of property or impose a liability; he does not require any auctoritatis interpositio, any present assistance from his guardian. But the difference is this that, unless the curator gives his sanction (whether in praesenti, before, or

after the transaction), all such acts of his as purport to alienate property or impose a liability, are nugatory as far as any effect on his property is concerned. If, instead of procuring the consent of the curator, the minor himself ratifies his act after attaining majority, the act is also binding. Wherever incapacity of *disposition* is concerned, it is the effect of the juristic that comes into question; wherever, on the other hand, incapacity of *action* is concerned, it is the existence of the act that comes into question. § 31.

pr. I. de curat. (1, 23): Masculi puberes et feminae viripotentes usque ad vicesimum quintum annum completum curatores accipiunt.

As opposed to capacity of action we have two other capacities, viz. (1) 'proprietary' capacity; (2) 'delictual' capacity.

(1) 'Proprietary capacity,' which, as we have seen (§ 20), is the prime characteristic of a person within the meaning of private law, is the capacity to hold property, taking the word property in its widest sense as including both rights and debts. Proprietary capacity, in other words, means both the capacity to acquire rights and the capacity to incur liabilities. An infans may, like others, acquire rights and incur liabilities, e. g. by the act of his guardian. By capacity of action, on the other hand, we mean the capacity to acquire rights and incur liabilities by one's own act, i. e. by a manifestation of one's own will. An infans has proprietary capacity because he is a person, but he has no capacity of action.

(2) 'Delictual capacity' is the capacity to incur a delictual liability. It is not governed by precisely the same rules as capacity for juristic acts, i. e. capacity of action in the narrower sense of the term. A person who is incapacitated from all acts, such as an infans or a furiosus, is also incapable of any delictual liability. But a person whose capacity of action is imperfect may become liable on delicts, if he appears to be doli capax (e. g. the prodigus, the pubertati proximus). Thus delictual capacity and complete capacity of action (including the capacity to conclude juristic acts) are independent of one another, the essence of the latter consisting mainly in the ability to incur liabilities by means of juristic acts (agreements).

§ 32. *Representation.*

§ 32. There are many juristic acts which a person may be bound or willing to conclude, but which he is unable to conclude in his own person. A lunatic cannot buy bread for himself even though he has money enough to pay for it. A rule of law prevents his concluding the act. Nor, again, is it practicable for the master to go to market every day and purchase the daily provisions himself. The conclusion of the juristic act is, in this case, prevented by physical reasons.

If I desire to conclude a juristic act on my own behalf and am prevented by purely physical reasons, I may frequently avail myself of the services of a messenger. The messenger serves precisely the same purpose as a letter, the purpose, namely, of overcoming the physical obstacle of distance. He makes the journey instead of me, but it is I myself who conclude the juristic act. Suppose, however, that in thus employing another, I have no intention of concluding the transaction myself. I may prefer not to determine all the details myself. It may be my purpose to let the negotiations, conducted with the person whom I have commissioned, decide the result; and be regarded in the same way as though they were carried on by myself on my own behalf. In this case, then, the person whom I employ is not merely to save me the journey, but is to conclude the juristic act for me. He is to weigh all the surrounding circumstances. The decision, the exertion of the will by virtue of which the juristic act is concluded, is his, not mine. Such is the true nature of representation. A messenger is merely a conduit-pipe for conveying my will; a representative is a person who wills instead of me. Representation, then, is the conclusion of a juristic act by one person acting for another.

It is obvious that a mere messenger would be of little use to a person who is himself legally incapable of concluding juristic acts (e. g. a lunatic, infans, impubes). Such persons must therefore necessarily act through a representative.

In the development of Roman law the distinction just adverted to is clearly brought out. Representation of such persons as are dis-

qualified by law from acting for themselves, in other words, that form of representation (we will call it 'tutelary representation') which is necessitated by the law itself, was recognized at an early period of Roman law. Thus a guardian (tutor) is fully qualified to act on behalf of his ward, and when he does so, his acts operate only as against the ward and not as against himself. § 32.

But the other form of representation, where one person, of his own free will, employs another, merely because he is physically prevented from acting himself (we will call it 'procuratorial representation,' or 'agency' simply) was never, on principle, recognized by Roman law. A procurator, i. e. a person freely chosen to represent another, cannot conclude a juristic act (e. g. a sale) for the person he represents, but must conclude it for himself. The only case where representation of this kind was allowed was for the purpose of acquiring possession, and, through it, such other rights (e. g. ownership) as are acquired through the medium of possession. This very limited use of agency constitutes a most important point of difference between Roman and modern law, for in modern systems of law both tutelary and procuratorial representation are, on principle, admissible in all transactions of private law. The juristic act is, in such cases, concluded by the agent, acting on behalf of another; in other words, as far as its conclusion is concerned (i. e. as far as the act of the will is concerned by means of which the juristic act comes into existence), it is the act of the agent. But as far as its effects are concerned—and in modern law this is the universal rule—the act operates not to the advantage or disadvantage of the agent, but of the principal, the 'dominus negotii.' In a word, the act is, in point of legal effect, the act of the dominus.

The principles of representation have no application, unless the circumstances are such[1] as to enable the party, with whom the agreement is made, to know that the other is only acting in a representative capacity. It is therefore only where the representative, be he a guardian or procurator, acts as such, in other words, where he either expressly avows himself the agent of a third party, who is the person

[1] So far, of course, as they operate at all; in Roman law, therefore, subject always to the limitations indicated above.

§ 32. really concerned in the transaction (the dominus negotii), or else where the circumstances themselves show clearly enough that he must be acting in such a capacity, it is only then that the rights and liabilities under the transaction accrue, not to the agent, but to the dominus negotii. The transaction must, in other words, be concluded in the name of the dominus negotii. The principles of representation have, therefore, no application except in those cases where the principal is *disclosed*, i. e. those cases where the other party knows, or might reasonably know, that the person he is dealing with is merely a representative.

On the other hand, if a person (be he guardian or another), though really acting on behalf of a principal, does nothing to show that he is doing so, but purports to be acting suo nomine, leaving his principal undisclosed—such a person is legally no agent at all, and neither in Roman nor in modern law would the principles of representation, in such a case, come into play. If an agent leaves his principal undisclosed, the effects of the act he concludes operate to the advantage or otherwise of himself, and not of the dominus negotii. A second juristic act is necessary for the purpose of assigning the effect of the first (e. g. the acquisition of ownership) to the dominus negotii. Secret representation is, therefore, no true representation at all.

Again the so-called 'involuntary representation,' i. e. that representation which the acquisitions of the slave or filiusfamilias pass by the necessary operation of the law to the dominus and paterfamilias respectively, is, strictly speaking, no representation at all (sup. pp. 109, 121). In all such cases the juristic act concluded by the son or slave operates, on principle, to the advantage, and never to the prejudice of the superior. Thus, on principle, he incurs no liability on a loan contracted by the son or slave, but still he becomes owner of the money thus received. In other words, there is only a partial operation of the principles of representation. It is only on certain other specific conditions that, in such cases, the superior becomes subject to the liabilities, as he is entitled to the benefits of the transaction (§ 75). And it is moreover to be observed that acquisitions of a son or slave pass by the operation of the law to the father or dominus, quite regardless of the fact whether the former were acting in their

own name or that of their superior, or again whether they were authorized to act or not. The rules on representation can have no application to a relationship of this kind. § 32.

II. THE PROTECTION OF RIGHTS.

(LAW OF PROCEDURE.)

---

§ 33. *Introduction.*

No man need submit to being forcibly and without authority deprived of what belongs to him. In repelling any such attack on his property, he is merely protecting his right by his own force. This kind of force, or, as it may be called, self-defence is permissible: vim vi repellere licet. The person assailed may be said, in a sense, to be exercising the right he is defending. § 33.

But it is a different matter, if the violation of the right is past and complete. It is then not a question of preventing, but of redressing the violation of right which has already taken place. In this case private force, or self-*help*, is not allowable. To attempt to obtain redress by means of your own strength, would be, not as in the first case, to exercise, but to transgress, the private right which has been infringed, because private law only confers rights of dominion over material (or unfree) objects, and never confers any direct power over the free will of an independent person. To coerce any will which offers resistance to the law, in other words, to execute the law, is, in Roman as well as in modern law, reserved for the state. Once a right has been definitely infringed, there is only one way of securing an execution of the law, and that is by invoking the power of the state, in other words, by an action at law.

§ 33. Obligatory rights have this peculiarity that, prior to the fulfilment of the obligation, the creditor can never be said to be exercising his right, and that his right is never directly available against a material object, but always only against the person of his debtor. It follows from this that, if a creditor seeks to obtain satisfaction by force, his act can never be one of legitimate self-defence, but must necessarily be one of self-help. Every person, therefore, who claims an obligatory right and desires to obtain satisfaction of his right by compulsory means must, on principle, seek his remedy by an action at law.

Self-help, which we may now define as the unauthorized taking of the law into one's own hands, was rendered penal as such in Roman law by a decree of Marcus Aurelius (the 'decretum divi Marci'). The punishment consisted in the delinquent forfeiting the right which he sought forcibly and without authority to enforce; and if he never possessed that right, he was compelled to restore double the value of the property he had forcibly appropriated.

There are however some exceptions to the law forbidding self-help, more especially that important case where, as a matter of fact, the judicial protection is inadequate, for instance, as against a debtor who attempts to abscond in order to escape an action. In such cases, even in Roman law, self-help was deemed lawful.

§ 34. *Roman Civil Procedure*[1].

§ 34. The fundamental characteristic of Roman civil procedure in the classical period is the division of all judicial proceedings into two

[1] Keller's *Der römische Civilprocess und die Aktionen* (6th edition, admirably revised by Wach, 1883) continues to hold its place as the standard work on Roman civil procedure. Of modern books which have materially contributed to our knowledge of this subject, we may mention more especially the following: Bekker, *Die Actionen des römischen Privatrechts*, 2 vols. (1871, 1873); Karlowa, *Der römische Civilprocess zur Zeit der Legisactionen* (1872); Baron, *Abhandlungen aus dem röm. Civilprocess*, 3 vols. (1881, 1882, 1887); Aug. Schultze, *Privatrecht und Process in ihrer Wechselbeziehung* (1883) p. 228 ff.; O. E. Hartmann, *Der Ordo judiciorum und die Judicia extraordinaria der Römer*, erster Teil: *Über die röm. Gerichtsverfassung*, supplemented and edited by A. Ubbelohde (1886). In quite recent times the question as to the origin of the formulary procedure has been successfully investigated by M. Wlassak, *Römische Processgesetze*, 1 Abteil, 1888; P. Jörs, *Röm. RW.* (1888), p. 174 ff.; Eisele, *Abhandl. zum röm. Civilprocess*, 1889. On the same subject, v. Wlassak, *Die Litescontestation im Formularprocess* (Festschrift für Windscheid), 1889.

sharply distinguished sections, the proceedings 'in jure,' and the proceedings 'in judicio.' § 34.

The proceedings 'in jure' are the proceedings before the magistrate, that is to say, before a judicial officer, the organ and representative of the sovereign power of the state. And since the introduction of the praetorship the 'magistrate' means, as a rule, the praetor. The object of the proceedings in jure is, firstly, to ascertain, whether the plaintiff's claim is admissible at all, i. e. whether there is any form of civil procedure by which it is enforceable; secondly, to determine the nature of such claim, and, at the same time, to fix the conditions subject to which it can be asserted. In the absence of a 'confessio in jure' (sup. p. 30), the proceedings in jure culminate in, and terminate with, the so-called 'litis contestatio,' i. e. the *formulating* of the legal issue, the object of which is to supply a foundation for the 'judicium' and thus to obtain a final decision of the issue. The name litis contestatio is due to the original practice of coupling with this stage of the proceedings a solemn appeal addressed by each party to his witnesses[2]. The

[2] Festus (*De Verborum Signific.*) says: Contestari litem dicuntur duo aut plures adversarii, quod ordinato judicio utraque pars dicere solet: testes estote. *Both* parties must appeal to witnesses (*contestari*). By this appeal they solemnly bind themselves to abide by the judicium on the issue thus formulated. Hence the notion that the carrying out of the litis contestatio creates a kind of obligation, 'judicio *contrahitur*' (Cic. *de Leg.* iii. 3; lites *contractas* judicanto: l. 3 § 11 D. 15, 1: sicut in stipulatione contrahitur cum filio, ita judicio contrahi). The litis contestatio, which commences with the appeal to the witnesses, constitutes the real 'litigare' or 'agere,' upon the basis of which the judgment proceeds (Cic. *pro Roscio*, 18. 53: Quid interest inter eum, qui per se litigat et qui cognitor est datus? Qui per se *litem contestatur*, sibi soli petit; alteri nemo potest, nisi . . . cognitor. Cp. § 35, note 1. — Festus' words 'ordinato judicio' have hitherto been taken to mean that the appeal to the testes did not take place till *after* the appointment (ordinare) of the judicium and, consequently, *after* the formulating of the issue, thus marking the closing act of the proceedings 'in jure.' It has however been very justly objected by Hartmann-Ubbelohde (pp. 448, 449) that to suppose the appeal to have followed the act of formulating the issue is to suppose something inconsistent with the very nature of the circumstances. It has moreover been clearly established by Wlassak (*Litiscontestation*, p. 72 ff.) that the word 'ordinare' is also used in the sense of 'preparing,' and more especially 'litem ordinare' in the sense of 'preparing the issue' (e. g. in the expression: bonorum possessio litis ordinandae gratia). 'Ordinato judicio' would accordingly mean 'after the judicium has been prepared.' Thus, as soon as it has been determined in what manner it is intended to formulate the issue, in other words, as soon as the *kind* of legis actio (corresponding at a later time to the contents of the formula) has been determined, the witnesses are appealed to and the contemplated act of formulating the issue (the litis contestatio) is solemnly performed in their presence. In old times

§ 34. granting of the litis contestatio by the magistrate is tantamount to a decision (decretum) on his part, that the plaintiff's claim is admissible in itself and must be enforced, subject to such limitations as result from the contents of the litis contestatio.

The proceedings in jure however can never lead to a 'sententia,' i. e. a judgment, in the legal sense of the term. The issue having been formulated and declared primâ facie admissible by means of the litis contestatio, it is necessary, for the purpose of obtaining judgment, that the proceedings should pass out of the hands of the magistrate into those of a private individual, or, in some cases, of several private individuals adjudicating as a collegiate body[3]. A sententia, in other words, a judgment, in the legal sense, can only be pronounced by a private person who cannot exercise any

this was done by pronouncing the solemn words of the legis actio. In the formulary procedure it was probably done (as Wlassak, *ibid.*, has shown) by the delivery, to the defendant, of the written formula, which the praetor had drawn up. It appears, then, that in the formulary procedure there was also a definite act by which, as in the earlier procedure, the parties themselves joined in formulating the issue in a manner agreed upon, the plaintiff, as it were, uttering, and the defendant accepting, the formula and, with it, the judicium. In the formulary procedure this act of the parties was also at the outset coupled with an appeal to the witnesses (Wlassak, *ibid.* p. 70 ff.), but the fact that the formula was written deprived this ceremony of the practical meaning it had possessed at the time of the oral formulae of the legis actio, so that it gradually fell into disuse during the empire.

[3] All actions touching the liberty of a person were, during the republic, tried by a standing college of ten sworn judges (decemviri stlitibus judicandis). Actions concerning vindicationes, especially the hereditatis vindicatio, were referred to the college of centumviri consisting of 105, and later of 180 members, who were grouped in several committees (consilia). If the praetor wished to have a matter speedily decided, he was able, by virtue of his imperium, to appoint an extraordinary college of, usually, three or five 'recuperatores' who were directed to find a verdict within a specified time. Such cases of urgency arose especially in actions concerning personal liberty (vindicatio in libertatem), with the result that the jurisdiction of the decemviri was de facto displaced by the court of recuperatores—a circumstance which explains why, since Augustus, the decemviri ceased to act in this capacity. Recuperatores were also appointed in actions to which aliens were parties. — Like the single judges, the recuperatores (who were always appointed for the nonce) and the centumviri were, as such, private persons. Although three centumviri were selected from each of the thirty-five tribes, there is nothing to show that they were chosen by the comitia tributa. The decemviri however had, towards the close of the republic, to be elected by the comitia tributa, so that formally they belonged to the magistratus (minores) populi Romani, a fact which however did not alter their position as against the litigant parties. All sworn judges whatsoever, including the decemviri, stand to the parties solely in the position of private individuals (judex privatus), and not in the position of magistrates equipped with compulsory powers; v. Pernice, *ZS. der Sav. St.* vol. v. p. 48.

sovereign discretion, because he in no way represents the absolute power of the state, but is bound, by the oath under which he is acting, to adjudicate in strict conformity to the law as already established [4]. Thus no one but a private person can be a judex in the true sense of the term, i. e. an organ of the positive law. For every decision of a magistrate is formally (even in civil cases) an assertion of his sovereign imperium (a decretum or interdictum). It is, legally speaking, not a verdict, but an imperative order [5]. On the other hand, the decision of a judex, i. e. of a private person acting under oath and under an authority based, not on imperium, but on officium,—such a decision, and it alone, is a judgment, a verdict, a 'sententia,' and not an order, an imperative command. And this is the reason why the law of civil procedure in Rome required that the magistrate should abstain from deciding the legal issue, and should refer such decision to a private person who is thereby appointed judex for purposes of the action. The principle of the division of all civil procedure into the two stages of proceedings in jure and proceedings in judicio is the elimination of the magisterial power from the domain of private law. § 34.

[4] Cp. pr. I. de off. jud. (4, 17): Superest, ut de officio judicis dispiciamus, et quidem in primis illud observare debet judex, ne aliter judicet quam legibus aut constitutionibus *aut moribus* proditum est. Unlike the magistrate (sup. p. 28) the judex is absolutely bound by customary as well as other law. He is only allowed to depart from the law on the express instructions of the praetor (exceptio, actio in factum, &c.), and the responsibility for such a departure rests not on him, but on the magistrate alone. In applying the customary law the judex becomes, at the same time, an unconscious instrument for developing it. Bekker, *Die Actionen*, &c., vol. ii. p. 145 ff., is right in pointing out this fact, but he formulates his statement in a misleading manner, which would lead one to suppose, quite erroneously, that the judex had *a right* to develop the positive law similar to that exercised by the magistrate.

[5] This is the reason why a magisterial decision, even in civil matters, could be annulled by the intercession of a co-ordinate or a superior magistrate, i. e. by means of a counter-order of equal imperative force (imperium). One order simply annulled the other. It was this fact that gave rise to the system of appeal as developed in the older Roman law, one magistrate being 'appealed to' to intercede against the other. The practice of appealing to the emperor, who was authorized to withdraw any suit in the empire from the ordinary courts for the purpose of bringing it before his own court, led, during the principatus, to the development of the modern system of appeals, under which (as in the old 'provocatio') the courts are ranged in a series of higher and lower instance, a higher court trying the case over again with a view to pronouncing a *new* judgment. Cp. J. Merkel, *Abhandlungen aus dem Gebiete des römischen Rechts*, Heft 2: *Über die Geschichte der classischen Appellation* (1883).

§ 34. The issue, then, having been admitted and formulated in jure (litis contestatio), the next step is to pass it on for trial to a private judge, or judges, acting under oath. The proceedings before the judex are called the proceedings 'in judicio.' The object of these proceedings is, as we have already stated, to obtain a decision of the legal issue by means of the judgment (sententia) of the judex. The judge's first business will be to ascertain the facts of the case and receive such evidence as he deems necessary; after which he will proceed, according to the best of his knowledge and good faith (ex animi sententia), to pronounce judgment, i. e. to give his verdict on the legal relationship submitted to him.

While the procedure in judicio did not, as far as we can see, undergo any material alteration from the time of the Twelve Tables down to the end of the classical epoch, an important reform had been effected in the procedure in jure towards the close of the republic. The system of legis actiones was superseded by the formulary procedure.

§ 35. *The Legis Actio.*

§ 35. The litis contestatio, with which the proceedings in jure terminated, was, in the early Roman procedure, a solemn act of the parties. When the arguments before the magistrate had concluded and the latter was about to grant a judicium, both parties, having solemnly called upon witnesses to testify to the issue between them, proceeded, in the presence of these witnesses, to formulate the issue in an unequivocal manner by means of their own formal act, using for this purpose, certain fixed traditional terms (litis contestatio, sup. p. 149). The formulae to be pronounced were determined either by the wording of a popular statute, the statute namely on which the action was based, or by old traditional custom which was regarded as possessing the same force as a law (lex). Hence it was that the act of performing the litis contestatio, nay, even the entire procedure of which the litis contestatio was the centre and pivot, was called a 'legis actio[1],' i. e. a proceeding according to the law. And

[1] The litis contestatio itself is also called actio, as in Gajus iv. § 11: in actione vites nominaret. And, in a formal sense, it *is* the real legis actio,

by an action, in the true, the normal, the proper sense of the term, § 35.
was understood a proceeding which led to a litis contestatio of this kind, and, through it, to a judicium and the judgment of a sworn judge, as opposed to the decision of a magistrate. But there was yet another sense in which such a procedure could be called a 'legis actio,' in the sense namely that not only the form of the litis contestatio, but the very right of the party to claim a judicium in any such case on the ground of the litis contestatio, was determined by the lex, or custom having the force of lex. The Roman actio, in other words, represents a right of the plaintiff not only as against the defendant, but also as against the magistrate, a right, namely, to have a judicium, i. e. a right to have the judicial, as opposed to the administrative machinery, placed at his disposal, in a word, a right to have a private individual appointed for the purpose of deciding by his judgment the question at issue between him and his adversary. This title to a judicium, i. e. the actio, rests in early times on lex, or custom with the force of lex. And for this reason it was called legis actio.

Of legis actiones we have five—(1) the L. A. sacramento, (2) the L. A. per judicis postulationem, (3) the L. A. per condictionem, (4) the L. A. per manus injectionem, (5) the L. A. per pignoris capionem.

I. The Legis Actio sacramento.

The ordinary and most important form of the legis actio procedure was the so-called 'legis actio sacramento.' Both parties, with a view to the litis contestatio, solemnly affirm their legal claim. The plaintiff declares: 'ajo hanc rem meam esse ex jure Quiritium,' &c., and the defendant answers with the same formula. Thereupon both deposit a sum by way of wager, the so-called 'sacramentum,' which amounted, according to the matter in dispute, either to 50 or 500 asses, and which each party declares shall be forfeited, if his contention proves to be false. This wager supplied the formal basis for the judicium, i. e. the formulating of the issue, and, when once entered upon, may be presumed to have, at the

the solemn raising and opening of the legal issue in the ordinary course, coupled with an application for a judicium (sup. p. 149, note 2).

§ 35. same time, formally established, as regards the magistrate, the right to a judicium (i. e. the actio). If a man challenged another to a wager (sacramentum) in reference to some legal claim primâ facie possible, he was thereby enabled not only to compel his opponent to lay a counter-wager, but also to require the magistrate to appoint a judex. This legis actio was thus, in the truest sense, a legis actio sacramento, for the judicial wager was the basis both of the decision of the judicium and of the formal title to the judicium. The private right secured its actio *by means of* the sacramentum [2].

II. Legis Actio per judicis postulationem.

There were, however, some particular cases where the law annexed to the existence of certain facts, facts, namely, constituting contracts and delicts of a specified kind, an *immediate* actio or right to a judicium. There was no need to lay a wager (sacramentum) and incur the consequent perils of a law-suit. In order to compel the magistrate to direct a judicium, all that was required was that the plaintiff should affirm in jure the existence of the particular facts, whether a contract or a delict, and should, on the ground of such facts, in solemn words claim to have a judex appointed. But it was indispensable that the facts of the case should tally precisely with those indicated by the verba legis, and that therefore, in setting

[2] It is probable that the compulsory force of the sacramentum as against the magistrate is based on the fact that, originally, it was not merely a matter of money laid against money, but oath against oath (i. e. sacramentum, in the ordinary sense of the word). The person tendering the oath pledges, for the truth of his oath, either his own person (i. e. he consecrates himself to the gods), or he only pledges some portion of his property which he thereby consecrates to the gods, which he, in other words, agrees shall be forfeited to the gods, if the decision goes against him. In civil proceedings, the latter kind of oath, where a man merely stakes some portion of his property (the 'Vieh-Eid' of German law), is sufficient. Even it, moreover, was enough to raise a question which required to be decided by an objective judgment; in other words, was enough to deprive the magistrate of all power to reserve the matter for his own decision (decretum), and to compel him to appoint a sworn judge (judex), or a college of sworn judges (e. g. the centumviri), to decide it by means of a verdict, or sententia. The oath, in a word, establishes the actio, i e. the claim to a judicium. Subsequently the oath was dropped, and the consecrated sum of money (sacramentum, in this sense) alone remained, though, as a matter of fact, the actual depositing was, in later times, dispensed with, the money being merely promised. Schultze (*loc. cit.* p. 455 ff.) regards the sacramentum as a judgment given by the party on his oath. Of course it is a judgment in the logical sense of the term, but scarcely a judgment in the sense of civil procedure, i. e. in the sense of deciding the question at issue.

forth these facts, the exact verba legis should be employed. Inas- § 35.
much then as, in these cases, the application for a judex immediately bound the magistrate to grant the judicium, this legis actio was called the L. A. per judicis postulationem [3].

III. Legis Actio per condictionem.

The L. A. per judicis postulationem had been designed for the enforcement of claims in personam. Actions for the enforcement of such claims received a further development by means of the L. A. per condictionem, which was first introduced by the lex Silia for the recovery of a fixed sum of money (certa pecunia), and afterwards extended by the lex Calpurnia to claims for a certa res [4]. Whenever the plaintiff in an action in personam undertook to fix his claim against the defendant precisely at some liquidated amount (certam pecuniam dare), or to specify a particular object ownership in which should be conveyed to him (certam rem dare), he could, as in the L. A. per judicis postulationem, claim from the magistrate the immediate appointment of a judex. This condictio had its danger as well as its advantage. Its danger was that the plaintiff, though entitled to something, was nevertheless cast in his suit, if he had not claimed the precise amount due to him. Its advantage lay in this that it applied also to such cases the facts of which did not in themselves entitle a person to the judicis postulatio; nay

[3] In my opinion the 'legis actio de arboribus succisis,' instanced by Gajus bk. iv. § 11, refers to this legis actio per judicis postulationem. There seems to be no doubt that the original action, as based on the Twelve Tables, really only lay for cutting *trees* and nothing else. The extension of the action to other cases, especially to the case of vites succisae, was due to the interpretatio of a later time; but even when thus applied, the words used in the litis contestatio had still to be those prescribed by the statute, viz., 'de *arboribus* succisis.' This was the source of the formalism of which Gajus speaks. For it is of course out of the question that, in speaking 'de arboribus succisis,' the Twelve Tables intended, from the outset, to include also vites. The rule then that an action should only lie de arboribus succisis, meant originally that an actio should lie on facts precisely corresponding to the words of the statute and no other. In the course of the subsequent development this rule, though really abandoned by the admission of the actio de vitibus succisis, was nevertheless maintained by a fiction, the action being still formally taken de arboribus succisis only. The absurdities of the formalism noted in Gajus must, therefore, be considered the result of a subsequent development. The legis actio fiduciae supplies another example of the L. A. per judicis postulationem (sup. p. 36, note 11). For further cases v. Voigt, *Die zwölf Tafeln*, vol. i. p. 586 ff. On the L. A. per judicis postulationem, cp. A. Schmidt, *ZS. der Sav. St.* vol. ii. (1881), p. 155 ff.

[4] GAJ. iv. §§ 18–20.

§ 35. even to cases where, possibly, there was no indisputable legal claim at all, as, for example, when the only feature of the case was that A had been enriched at the expense of B. In the L. A. per judicis postulationem the litis contestatio merely formulated the facts of the case without in any way indicating the nature of the claim deduced therefrom (legis actio in factum concepta), and, conversely, in the L. A. per condictionem the litis contestatio merely formulated the legal claim without mentioning the facts from which it was deduced (legis actio in jus concepta). It was an abstract action where the concrete facts, on which the claim rested, were not referred to in the solemn act of formulating the issue (litis contestatio)[5].

For cases falling under this second legis actio, the law required that the judicis postulatio should be made in a manner differing from the practice traditionally observed in the case of the L. A. per judicis postulationem. For in this latter action, the magistrate, in accordance with ancient usage, appointed the judex at once[6]. The L. A. per condictionem had this characteristic of the later procedure—a characteristic which was connected with the general arrangements of a later period for the appointment of judges[7]—that, instead of a judex being appointed at once, the parties agreed to reappear in jure before the praetor in thirty days for the purpose of selecting and appointing a judex (ad judicem capessendum). The plaintiff at the same time gave the defendant formal notice to reappear within thirty days before the magisterial tribunal for the purpose of appointing the judicium[8]. This notice was called 'condictio,' which means literally an 'agreement' or 'convention,'

[5] J. Baron, *Abhandlungen aus dem römischen Civilprocess*, vol. i.: *Die Conditionen* (1881).

[6] Gajus iv. § 15: Ut autem [die] xxx. judex daretur, per legem Pinariam factum est; ante eam autem legem [stat]im dabatur judex. What Gajus here says about the former practice of immediately appointing the judex in the L. A. sacramento, may reasonably be assumed to apply also to the L. A. per judicis postulationem. Quite apart from the evidence of Studemund, the reading 'nondum dabatur judex' ought, I think, to be rejected on practical grounds. It is scarcely credible that the L. A. sacramento was ever a procedure without any judicium at all, i.e. solely in jure (as e.g. A. Schmidt assumes, *loc. cit.* p. 160, n. 3), and the contrary is clearly proved both by the nature of the action (sup. pp. 153, 154) and the ceremonies incident to the L. A. sacramento, which had no other purpose but the obtaining of a judicium.

[7] Cp. on this point, Karlowa, *Civilprocess zur Zeit der Legisactionen*, p. 252 ff.

[8] The stay of thirty days might have served the additional purpose of giving

and hence the name legis actio per condictionem. It is to be observed, that the force of the qualifying words 'per condictionem' is precisely analogous to that of the words 'per judicis postulationem' in the other legis actio. In either case the plaintiff's application for a judex is directly binding on the magistrate. § 35.

IV. Legis Actio per manus injectionem.

In certain extraordinary cases the actio arises from a completed act of execution, in the same way as, in the L. A. sacramento, it arises from an act of affirmation.

The normal form of execution is judicial execution, i. e. the act of laying hands on one's adversary in jure in the presence of the magistrate (manus injectio)[9]. It means the attachment of the defendant for the purpose of making him the bondsman of his creditor. The party attached is disqualified from making any defence himself, because the effect of the manus injectio is to place him ipso jure in the position of a slave (servi loco)[10]. A third party, however, may intervene as a vindex and counteract the

time to the defendant, and thereby affording him an opportunity of voluntarily satisfying the plaintiff's demands in the interval. It was obvious that the plaintiff would get a judicium. The praetor had, in fact, acknowledged his claim to be such as to entitle him to a judicium. This circumstance (it was thought) would offer the defendant a strong inducement to settle voluntarily with the plaintiff within the thirty days interval allowed him. Baron, *loc. cit.* p. 211.

[9] Extra-judicial manus injectio is never a real act of execution. It means either the taking possession of an unfree person (as, in Livy iii. 44, Claudius applies the manus injectio to Virginia, with a view to taking her to his home as a slave), or it is an act of summons. If the defendant disregarded the in jus vocatio, i. e. the solemn oral summons addressed to him by the plaintiff, the latter could always lay hands on him (manus injectio), with a view to bringing him before the Court (Twelve Tables, i. 2). In some cases the plaintiff could proceed to manus injectio at once without any previous in jus vocatio. He could thus arrest, e. g. a judgment debtor (judicatus), in order to take him before the praetor for the purpose of there carrying out the judicial manus injectio; or again a 'fur manifestus,' or other person who had committed a delict partaking of a criminal nature (Demelius, *ZS. für RG.* vol. i. p. 362 ff.). But extra-judicial manus injectio of this kind, though it serves the purpose of introducing legal proceedings, is, in itself, totally immaterial as far as the course of procedure itself is concerned; it is always merely preliminary to, never productive of, an action at law. Judicial manus injectio, and it alone, can beget an *action*. Thus, though there are several forms of manus injectio—judicial or extra-judicial manus injectio, and of the latter again several kinds—there is nevertheless but one legis actio per manus injectionem, that actio namely which springs from the judicial manus injectio or act of execution.

[10] The fact that the manus injectio ipso jure debarred the person attached from making any defence confirms the supposition that, in the early law, the efficacy of manus injectio was independent of any addictio on the part of the praetor; cp. Jhering, *Geist des Röm. R.* vol. i. p. 152.

§ 35. effect of the 'manum injicere' by means of 'manum depellere.' The manum depellere operates to annul the preceding manus injectio, in other words, the debtor is free once more and cannot be attached again for the same cause. But, on the other hand, the vindex is now bound to indemnify the creditor whose act of execution he has nullified. He must give immediate satisfaction for the debt to recover which manus injectio had been resorted to[11]. If, however, he refuses to pay the debt on the ground that he challenges the legality of the manus injectio, the law-suit commences and the vindex, if defeated, is cast in double damages. The suit has to be decided by the ordinary procedure, a judex being appointed for the purpose. It is in this sense that manus injectio begets an actio[12], viz. the L. A. per manus injectionem. Judicial manus injectio (i. e. the act of execution) implies a right to have any issue that may arise in the event of the claim being contested, tried by a judicium.

Judicial manus injectio can only be used in the case of a liquidated money claim. The regular instance of this kind is the judgment-debt, i. e. a fixed sum which a person has been condemned to pay by the sententia of a sworn judge ('in judicio'). An 'aeris confessus,' i. e. a person who had admitted a money-debt in jure before the magistrate, was regarded as occupying the same position as a judgment-debtor, and was thus liable to 'manus injectio pro judicato.' It is probable that originally a debt incurred by nexum, i. e. the formal obligation of the early civil law (sup. p. 26), was treated in the same way as a judgment-debt. Several later statutes assimilated other debts to judgment-debts, the harsh effects of the manus injectio, however, being in most cases mitigated in such

[11] Cp. Livius, vi. 14: (M. Manlius) centurionem, nobilem militaribus factis, judicatum pecuniae cum duci vidisset, medio foro cum caterva sua accurrit et manum injecit, vociferatusque de superbia Patrum ac crudelitate foeneratorum . . . rem creditori palam populo solvit, libraque et aere liberatum emittit. It should be observed that the term manum injicere is here also applied to manum depellere. Thus we have manus injectio against manus injectio, just as in other cases we have sacramentum against sacramentum. In the Twelve Tables (iii. 3) the vindex, in acting as described, is said to vindicare; it is a case of force (manum depellere) against force (manum injicere). Cp. Demelius, *Die Confessio*, p. 56.

[12] Jhering (*Geist*, &c., vol. i. p. 152 ff.) was the first to draw marked attention to the effect of manus injectio in *begetting* an action-at-law.

a manner as to allow the debtor to be his own vindex, to 'manum sibi depellere' himself, so that he (the debtor) became the defendant in the resulting action, if any, and was himself liable in duplum in case of condemnation. Thus there were two species of this form of actio, firstly, the L. A. per manus injectionem pro judicato (where the debtor could only defend himself through a vindex), and, secondly, the L. A. per manus injectionem pura (where the debtor might defend himself in person). But in any case the manus injectio which had been carried out in jure remained the formal subject of the law-suit as well as of the decision, because in point of form the actio (i. e. the claim to a judicium) did not spring directly from the private law, but from the manus injectio. § 35.

V. Legis Actio per pignoris capionem.

Pignoris capio is a process akin to manus injectio. The law invested debts of a particular kind with special privileges by allowing the creditor to obtain satisfaction for them by an extra-judicial seizure of portions of the debtor's property. Every such authorized pignoris capio was characterized by the use of certain prescribed words (certa verba) which had to accompany its execution. The distrainee was bound to redeem the property seized within a prescribed interval, with the addition, probably, of a penalty; in default of which we may presume that the ownership in the goods distrained passed to the distrainor. The latter generally exercised his right of ownership by destroying the things (pignora caedere), because the primary object of the distraint was not to satisfy the creditor, but to punish the refractory debtor.

The distrainee must have had the right, in some form or other, of protesting before the magistrate in jure against the distraint which had taken place. Just as, in the preceding instances, the proffering of an oath (sacramentum) by one party, compelled the other to tender a counter-oath, and the manum injicere by one compelled the other to manum depellere, so here the pignoris capio compelled the distrainee, if he wished to make any defence, to enter a protest. Here, then, was another special issue which the magistrate had no power to reserve for his own decision, but was bound to send for trial before a judex. It was in this way that

§ 35. pignoris capio begot an action, viz. the L. A. per pignoris capionem [13].

The cases in which pignoris capio was available, were not, as far as we can see, sufficient in themselves to give rise to ordinary civil proceedings. They were partly claims of a public nature, e. g. a soldier's claim for his pay, for money to buy a horse, or for barley to feed his horse, or again the claims of farmers of the public revenue for arrears of taxes due to the state; partly they were cases of a private law liability, which we may describe as not having given rise to any legal obligation in the early times. Thus if a victim had been sold for sacrificial purposes by means of an informal contract of sale, or again, if a beast of burden had been let out under an informal contract of letting with a view to investing the consideration money in the purchase of a lamb to sacrifice to Jupiter, the guardian deity of harvests—in neither case did the purchaser or hirer respectively incur any legal liability. It is possible also that pignoris capio was resorted to in the case of 'damnum infectum'; that is to say, where a man's property was in danger of being injured, though not yet actually injured, by the state of his neighbour's property (e. g. by the dilapidated condition of his house), he was perhaps allowed to seize some of the neighbour's land by way of pignoris capio [14].

In none of these cases was there any action at law. Nor was the legis actio sacramento available, because the sacramentum had to affirm a dare or facere oportere, in other words, the existence of a liability fully enforceable at civil law. But by the circuitous method of pignoris capio the creditor's claim was either satisfied in

[13] Cp. Jhering, *Geist*, &c. vol. i. p. 159 ff.; Karlowa, *Legisactionen*, p. 201 ff.; Mommsen, *Röm. Staatsrecht* (3rd ed.), vol. i. p. 177, note 1; Wlassak, *Processgesetze*, p. 251 ff.; Gajus iv. 32 proves, to my mind, that pignoris capio was capable of leading to a judicium and was designed for that purpose, though Wlassak (*loc. cit.*) holds otherwise.

[14] This is von Bethmann-Hollweg's conjecture (*Civilprocess*, vol. i. (1864), p. 204, note 13), and it has been endorsed by several learned writers, e. g. Karlowa, *Legisactionen*, p. 216 ff.; Wach, in his edition of Keller, *Röm. Civilprocess*, 6th ed. § 20, note 267 a. This view has been impugned by Burckhard in Glück's *Commentar zu den Pandekten*, book 39 (1875), p. 77 ff., and quite recently by Wlassak, *Processgesetze*, p. 259 ff.—Pignoris capio was certainly applicable to land, the practical effect being that the land was laid waste and the house levelled to the ground (pignus caedere), Mommsen; *Staatsr.* vol. i. p. 152.

such a way as to put a penalty on the distrainee, if he submitted to the pignoris capio, or else was brought to trial (actio), if he (the distrainee) protested. § 35.

The right of pignoris capio was said to have 'instar actionis,' i. e. to grant a right of distraint was virtually to grant a right of action.

VI. Recapitulation.

To sum up. Private law grants a legis actio either directly (L. A. per judicis postulationem, per condictionem), or indirectly. The means by which a private right, which is not directly enforceable by the ordinary civil procedure, can nevertheless secure a trial or actio, are either a solemn affirmation (sacramentum) or a solemn act of execution, which latter can be either personal (manus injectio) or real (pignoris capio).

The legis actio sacramento is the general form of action; the remaining legis actiones are restricted to such cases as are determined by statute (lex) or ancient custom with statutory force.

These special legis actiones are, each and all, modes of enforcing obligatory rights; in other words, they are forms of so-called 'personal' actions (inf. § 39). Thus we have an abundance of actions whose object it is to protect the rights of creditors. A creditor, however, may also proceed by legis actio sacramento, not only when his claim is for a 'certum,' but also where it is for an 'incertum (e. g. pro fure damnum decidere oportere), provided only the existence of his claim was disputed, and the peculiar form of trial by wager, which required two mutually exclusive allegations, thereby became practically applicable. But whenever the claim was not personal, but real, i. e. whenever it sprang from some relation of power, whether a power over things (ownership, inheritance, servitude) or over persons (marital, paternal, tutelary power), in all such cases the legis actio sacramento was the sole form available. Having seized the object in dispute[15], both parties had solemnly to affirm their title to it sacramento (vindicatio and contravindicatio)[16]. In this

[15] Corresponding to the 'anefang' in the German form of vindicatio. Cp. Gajus, iv. 16. The seizing of the object was coupled with the ceremony of festucam imponere, the staff being the symbol of power.

[16] The sacramento provocare, i. e. the affirming of one's own word, involved

§ 35. way the litis contestatio was arrived at and the foundation for the judicium laid. Pending the judicium, the praetor, acting on his own discretion, regulated the interim possession (vindicias dare).

We have thus, on the one hand, only one form for actions of ownership, in fact, only one form for real actions of any kind; on the other, a profusion of actions for the enforcement of obligations. From the very outset the productive genius of the Roman law of procedure, like that of other departments of Roman law, characteristically exhibits itself within the sphere of the law of obligations [17].

> Gaj. Inst. IV § 11: Actiones, quas in usu veteres habuerunt, legis actiones appellabantur, vel ideo quod legibus proditae erant (quippe tunc edicta praetoris, quibus conplures actiones introductae sunt, nondum in usu habebantur), vel ideo quia ipsarum legum verbis accommodatae erant, et ideo immutabiles proinde atque leges observabantur: unde eum, qui de

the impeachment of the other party's word (injuria vindicavisti), which was thereby, legally speaking, annulled, the party himself being thus compelled to make his reply by means of a counter-sacramentum. (Compare the precisely similar effect which resulted in German law from the fact that one party, by his deed or oath, impeached the deed or oath of his adversary).

[17] From an historical point of view, the legis actiones are divided into two groups, those of an older and those of a later type. The legis actiones of the first group, which are antique in character, are marked by the prominence in their procedure of the element of private force, which is the source and fountain-head of all actions whatever. To this class belong the L. A. per manus injectionem and the L. A. per pignoris capionem. The ancient civil procedure both of the Romans and Germans is nothing more than a form of self-help sanctioned by the law. And even the vindicatio sacramento bears clear traces of a similar character. In the proceedings in jure both parties are seen exercising force; they are struggling for the possession of the object in dispute, they both lay hands on it. At this moment the judge steps in and commands peace: mittite ambo hominem! Both parties must let go the object (e. g. the slave who is 'vindicated'). The judge alone has now power to deal with it; he is free to act as he pleases in awarding possession (vindicias dare). A wager is then laid with regard to the preceding act of force, and the judge is required to decide which of the parties was acting in the exercise of legitimate force, of justifiable self-help. The second group of actiones, on the other hand, the L. A. per judicis postulationem and the L. A. per condictionem, bear the impress of a later age. Everything is done peacefully. The parties merely ask to have a judex. The action is no longer a mere disguise thinly veiling what is really a bold exercise of self-help; the state itself dominates the legal system and the execution of the law, and the whole proceedings in jure merely represent an application by the parties for judicial proceedings. Cp. Bekker, *Actionen*, vol. i. p. 18 ff, and Bechmann's recent *Studie im Gebiet der legis actio sacramenti* (Festschrift f. Windscheid), 1888; Gradewitz, *Zwangsvollstreckung u. Urteilssicherung* (Berliner Festschrift f. Gneist), 1888; Matthiass, *Die Entwickelung des römischen Schiedsgerichts* (Rostocker Festgabe f. Windscheid), 1888, pp. 5–18.

vitibus succisis ita egisset, ut in actione vites nominaret, § 35.
responsum est rem perdidisse, cum debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.

§ 36. *The Formulary Procedure.*

The solemn act by which the parties themselves, at the con- § 36.
clusion of the proceedings in jure, formulate the legal issue (litis contestatio), constitutes the pith and climax of the legis actio procedure which we have just described. The oral formula of the parties, framed in strict adherence to, and operating by virtue of, the letter of the law, begets the 'actio,' i. e. the concrete, formal right to a judicium, and, at the same time, supplies the foundation upon which the judicium proceeds.

This solemn act of procedure cannot be repeated[1]. It necessarily follows, therefore, in the first instance, that the solemn litis contestatio of the legis actio procedure operates ipso jure to destroy the right of action. That is to say, in the same moment when the litis contestatio gives birth to the actio in the formal sense of the term (i. e. to the right to claim a judex for the dispute in question), in the very same moment the actio in its material sense (i. e. the right to the litis contestatio) is annihilated. The litis contestatio can only be carried out once and no more. Its effect is to *consume* the right of action.

It follows, moreover, in the second place, from the same rule that, if a mistake has been made in the formula, there is no way of correcting it and saying the formula over again in an amended form. A faulty formula entails the loss of the action, for the oral formula admits neither of repetition nor amendment[2]. The reason

[1] Precisely the same idea is to be found in the old German procedure where the rule 'a man a word' was applied, i. e. every man has only one word which, once uttered, can neither be retracted nor repeated nor amended. I might suggest that this rule, itself an expression of the formalism which dominates all early procedure, supplies the desired explanation (v. Wlassak, *Litis cont.*, p. 57, note 1) of the 'consuming' effect incident to the old solemn act of litis contestatio.

[2] GAJUS, iv. 108: Alia causa fuit olim legis actionum; nam qua de re actum semel erat, de ea postea ipso jure agi non poterat; nec omnino ita ut nunc usus erat illis temporibus exceptionum. Cp. GAJ. iv. 11, sup. p. 162.

§ 36. why the use of the formula is attended with the risks incident to an action is because it is itself an act which operates to consume a right of action.

It was however inevitable that the oral formula should soon prove inadequate for the purpose for which it was designed, the purpose namely of formulating the dispute for the decision of the judex. The oral formulae were immutable, because the wording of the statutes on which they were founded was immutable. But the law which was developing on the basis of these words was none the less changeable. True, the letter of the law frequently received, in practice, a sufficiently liberal interpretation. On the strength of a section of the Twelve Tables dealing 'de arboribus succisis,' the practice of the courts subsequently admitted an action 'de vitibus succisis.' But the wording of the Twelve Tables, and consequently also the wording of the spoken formula, remained the same. The words of the litis contestatio had to be de arboribus succisis, even when, as a matter of fact, the plaintiff intended to sue de vitibus succisis[3]. But how was the judex to find out the real meaning of the parties from a litis contestatio framed in that manner? The result, inevitable in such circumstances, was, that the litis contestatio became a mere mask for covering a variety of cases of a widely different character. Thus it happened, often enough, that the formulating of the legal issue, as carried out in the litis contestatio was a mere pretence. In order therefore to pierce the mask and discover the true nature of the issue before him, the judge had to resort to other expedients.

To all this must be added one other circumstance. The legis actio procedure was, so to speak, cut down and restricted to a definite number of statutable claims. It was a difficult matter (as we see in the case of the arbores and vites) to force a new law into the old moulds. But from about the middle of the third century B.C. onwards, as the inroads of the jus gentium became stronger and stronger, a large number of fresh claims arose, such as the bonae fidei judicia, the claims on informal sales, letting and hiring, and others, not based on, nor recognized by, any Roman statute, and

[3] Cp. supra p. 155, note 3.

lacking therefore the necessary credentials without which the pro- § 36.
cedure by legis actio remained closed to them. A new law for which there was no room within the narrow confines of the old legis actio was pushing its way into the Roman system. New skins were needed for the new wine.

And so it happened that at the same time when the forms of legal redress supplied by the legis actio began to fall short of the material requirements of the law, the necessity for a reform in Roman civil procedure (the legis actio procedure) became more pronounced.

It is characteristic of the tendency which marks the development of Roman law that a remedy by means of legislative enactment was not resorted to. It was time enough to invoke the interference of so inelastic an agency, when the aim and method of the desired reform had been clearly ascertained. Meanwhile the judicature was left to its own resources. The task of reforming Roman law thus naturally devolved on the praetor.

The praetor was enabled to act the part of a reformer by means of his imperium, i.e. by means of that regal power—formally unrestricted and subject only to the intercession of a magistrate of equal or superior authority—which he wielded during his year of office. It was in the exercise of his imperium that he appointed a private person judex, i. e. compelled him by his order to decide a legal dispute. Where the conditions of a legis actio existed, the praetor appointed the judex *in accordance* with the law, and in such cases the plaintiff had even a statutory *right* to the appointment. But the praetor had also the power to appoint a judex apart from the law, 'sine lege,'[4] simply in virtue of his sovereign imperative power (judicium imperio continens). And this power he exercised in all those cases where there was no legis actio, no statutable claim, but where the claim preferred was, nevertheless, such as to be, in his opinion, deserving of legal protection. The praetor, taking the responsibility on his own official authority, ordered the appointed judex, under certain conditions, to condemn or acquit, as the case might be. And

[4] Cp. Cicero, *de Off.* iii. 15, 61 : *sine lege* judicia, in quibus additur ex fide bona; *pro Q. Roscio*, v. 15 : arbitria honoraria; *pro Flacco*, 21, 50 : judicium *lege* non erat (scil. in the province). Cp. Eisele, *Abhandlungen*, pp. 88. 17.

§ 36. since, in such cases, a legis actio, a formulating of the issue by solemn act of the parties, was quite foreign to the matter in hand, the task of formulating the issue, and in this respect of fulfilling the functions of the legis actio, was performed by the praetor himself in the written decree which he drew up in appointing the judex. This decree was called 'formula,' because it soon became the practice to frame it after the model of certain 'forms' or 'formulae' set out in the praetorian album. Thus two different kinds of procedure came to be opposed to one another: the legis actio procedure and the formulary procedure, the essence of the latter being that, under it, the issue was formulated for the judex, and the groundwork and purpose of his functions as a judex were marked out, not by the legis actio (i. e. by the oral formula delivered by the parties), but by the decree of appointment (i. e. by the written formula delivered by the magistrate).

Of course the praetor would not use his imperium in this fashion unless, and as far as, there was occasion for him to do so, i. e. only where the exigencies of legal progress drove him to such a course. And this was precisely what occurred when the recognition of the jus gentium became a matter of imperative necessity. At the outset the formulary procedure was nothing more than a new form of procedure according to the jus honorarium, and was designed above all things to supply a method by which claims resting on the jus gentium could be realized. In this way the jus honorarium and the jus gentium, mutually co-operating with one another, advanced, as it were, hand in hand.

If this view of the case be correct, it may be presumed that the praetor peregrinus (sup. p. 48) was the first to find occasion to proceed by means of the formulary procedure. Whenever a peregrinus possessed the Roman jus commercii, he stood under no disability either in regard to Roman private law or in regard to the Roman law of procedure, and in such cases therefore there was nothing to prevent the use of the legis actio even in the court of the praetor peregrinus[5]. But the establishment of the

[5] Cp. Schmidt, *ZS. der Sav. St.*, vol. pp. 71, 100; Wlassak, *Processgesetze*, ix, p. 137 ff; Eisele, *Abhandlungen*, p. 204.

foreign praetorship coincides precisely with the time when, as a matter of fact, the jus gentium had already become the law properly applicable to the great majority of aliens (p. 41). The legis actio, however, was juris civilis, not juris gentium. A new form of procedure was thus urgently demanded by the requirements of such non-privileged aliens. It was to satisfy this want that the formulary procedure was employed. § 36.

But in the court of the praetor urbanus the development of the law was rapidly leading to an identical result. His jurisdiction was confined to cases where both parties were Roman citizens. But Roman citizens as well as aliens acknowledged the jus gentium, and the existence of legal liabilities arising from sale, hire, and other such transactions. Thus exactly the same agencies were at work pressing the praetor urbanus to develop the formulary in addition to the legis actio procedure. Whenever the claim which it was sought to enforce in his court admitted of legis actio, the legis actio procedure applied, in all other cases the formulary procedure was resorted to.

There is, however, no doubt that the formulary procedure steadily gained ground, and soon even began to dislodge the older procedure from its own peculiar domain. In the first instance the formulary procedure had only been resorted to juris civilis supplendi gratia, but it was not long before it proceeded a step further and boldly asserted its power to correct the civil or legis actio procedure. We have already pointed out that in many instances the mode in which the issue was formulated in the legis actio was inadequate and in no way indicative of the real facts of the case. In addition to this, the legis actio never got beyond an oral joinder of issue. And yet a single mistake in a single word entailed the loss of the whole suit. It is most probable that in a great many cases the evidence supplied by the mere statements of witnesses in regard to the words spoken in jure was felt to be obviously inadequate. All such inconveniences would be obviated, if the formula, the force and value of which the people had not been slow to appreciate, were used even in cases which, in themselves, admitted of the procedure by legis actio. The legis actio of the parties was tied to

§ 36. the verba legis and was thereby, in many cases, reduced to absolute unreality and hollowness. The magisterial formula, on the other hand, was unfettered; it contained the real matter at issue and not a mere empty form beneath which the truth lay concealed. Accordingly, whenever the praetor addressed a *written order* to the judex, there could be no doubt whatever, as far as the judex was concerned, as to the precise question upon which his verdict was required, and all the risks attending the use of a wrong word were, at the same time, avoided. Thus even where the procedure by legis actio was really available, there were sound practical reasons why the praetor should exercise his right to nominate a judge with a view to binding his nominee to act on the instructions (on the formula, namely) which he (the praetor) gave him.

Whether in such circumstances the formula and legis actio were used concurrently, or, as is more probable, the formula was substituted for the legis actio, in either case there was a distinct conflict between the civil law (which required legis actio) and the praetorian law (which gave the formula), a conflict, the sharpness of which must have been all the more noticeable, because at that time the praetorian power was as yet in the earliest stages of its development, and the legis actio was associated with the powerful influence of the pontifices. It was the pontifices who created, developed and interpreted the legis actio. To assail the legis actio was to assail the influence which the pontifical jurisprudence exercised over civil procedure and consequently over the interpretation of the civil law itself. By giving preference to the formula, the praetor thus came into collision with that influential college which till then had been the sole depositary of the civil law[6]. It was at this moment that interference by legislative enactment became necessary.

The popular enactment which struck in at this point was the lex Aebutia (about 150 B.C.). Two other laws (the leges Juliae) followed at a later date, probably not till Augustus. The lex Aebutia was confined to legal proceedings before the praetor

[6] The question raised by Pernice (*ZS. der Sav. St.* vol. vii. top of p. 54) is satisfactorily answered, if we bear in mind this close association of the interests of the pontifices with the legis actio.

urbanus, i. e. to those cases where a judicium was appointed to try a cause between Roman citizens within the first milestone from Rome, in short, to those very proceedings to which the legis actio was most strictly applicable. It provided that a judicium could be instituted in the city court (i. e. in the court of the praetor urbanus) *without* legis actio, merely by means of the formula or praetorian decree of appointment. The great controversy was thereby settled. Within the court of the praetor urbanus the formulary procedure had been declared a *civil law* modus agendi. Formula and legis actio were thus, as far as the civil law was concerned, placed on a footing of equality. In the city court the formulary procedure was now likewise a procedure 'ex lege,' and the judicium, which the praetor urbanus directed by means of his formula only, was now converted into a judicium legitimum. Henceforth the term judicia imperio continentia (judicia quae imperio continentur) was applied exclusively to the judicia appointed by the praetor peregrinus or to those which were held outside Rome. With regard to these no change of procedure took place. The magisterial imperium did not need any assistance from popular egislation, because its authority in these courts was unquestioned. The city court of the praetor urbanus, on the other hand, was, so to speak, the stronghold of the civil law and the legis actio, that peculiarly Roman form of civil procedure. The power of the praetor urbanus was, in truth, unequal to the task of ousting the legis actio from its strongest position. The assistance of the legislature was needed, and the method employed was to depreciate the legis actio—at once the product, and the source of power of, the pontifical jurisprudence—by investing the formula, for purposes of the city court, with a legal character. Thus the formulary procedure became legally available even in civil law causes. The legis actio procedure was not yet actually abolished. An option was left to the parties whether they would proceed by legis actio after the old fashion, or would avail themselves of the formula after the new method. The formula had, however, secured free scope for itself. It had now an opportunity of putting forth all its inherent capabilities. And in the competition between

§ 36.

§ 36. the two forms of procedure, there was, from the outset, no doubt which would win. In the legis actio procedure the formulating of the issue was an act full of pitfalls for the parties, inelastic and rigidly formal; in the formulary procedure the same act, stripped as it was of all the old formalism, had acquired elasticity, a capability of indefinite expansion, and a ready adaptability to claims of all kinds. Everything, in short, was in favour of the formula. The natural result was that, in the practice of the courts, the formulary procedure came, by universal consent, to be substituted for the legis actio procedure in the vast majority of cases. The culminating point was marked by the two leges Juliae which, like the lex Aebutia, were concerned with the procedure of the court of the praetor urbanus, and provided that henceforth the appointment of sworn judges should *only* be effected by means of a formula, and not on the ground of a preceding legis actio. The effect was, practically, and with a few exceptions presently to be mentioned, to abolish the legis actio. The formulary procedure had now become *the* civil procedure of Roman law. The object of the proceedings in jure had been definitely changed, the place of the old litis contestatio being taken by the grant of the formula, which now constituted the principal and also the concluding act of these proceedings. Henceforth it was the question contained in the formula and no other which the judex was required to decide in judicio.

The so-called 'introduction' of the formulary procedure by means of the above-mentioned enactments was, if our view be the true one, a process of the kind we have just detailed [7]. It was not, as we see, a sudden reform, a revolution, but merely the consummation of what had been gradually preparing itself. These laws were not the first to introduce the magisterial formula; what they

[7] In setting out this portion of my subject I have availed myself of the results of the labours of Schmidt, Jörs, Wlassak, and Eisele (v. sup. p. 148, note 1). Jörs has contributed more especially to our knowledge of the public relation in which the judex stood to the praetor; Wlassak has succeeded in elucidating the nature of the judicium legitimum; Schmidt and Eisele have shed additional light on the relations of the peregrini to the legis actio and formulary procedure. It is clear, however, e. g. from the argument in Eisele (p. 105 ff.) that all the difficulties have not yet been solved.

did was merely to emphasize the final victory of this formula over the oral formula of the parties, which had long existed side by side with it, a victory which itself was due to the logical necessities of the progressive evolution of the law. § 36.

There are two further facts which tend to corroborate and, at the same time, to illustrate our view of the character of that development of the formulary procedure which we have just endeavoured to render plausible.

The first of these facts is this, that whenever an action was to be decided in judicio by the judges of the so-called 'centumviral court,' a magisterial formula was not used, the proceedings being conducted in accordance with the forms of the ancient legis actio procedure (L. A. sacramento)—a practice which continued without break throughout the whole classical period of the empire at least as late as Diocletian. Actions concerning inheritances therefore, which in later times were certainly the most important subject-matter for the jurisdiction of the centumviral court, were still conducted according to the old traditional forms of the legis actio sacramento. And the reason was simply this, that the centumviral court already constituted a standing college of judges which did not require to be called into existence in each separate instance by the written decree of the praetor. In such cases there was accordingly no possibility of instituting a judicium, because a competent judicium, viz. the centumviral judicium, was already forthcoming. And inasmuch as this judicium was not called into existence by the decree of appointment (the imperium), the praetor was unable to bind the centumviri by instructions as to the conditions under which they were to condemn or acquit respectively. The absence of the praetorian decree of appointment thus explains everything; it explains why, in these cases, the formula did not come into use concurrently with the legis actio, and why the ancient litis contestatio was preserved; why, in short, in causes coming before the centumviral court the legis actio (sacramento) was not superseded by the formulary procedure. In the judicia privata, where a private individual had each time to be appointed judex for the nonce, the ancient ceremony of litis contestatio had found a rival in the praetorian decree of

§ 36. appointment; no such rivalry could spring up where there was no judex to appoint[8].

The second fact has reference to the so-called 'voluntary jurisdiction,' i. e. that kind of judicial procedure which serves the purpose, not of determining rights which are in dispute, but of establishing new rights. An example of this jurisdiction occurs in the case of in jure cessio, i. e. the transfer of a right by means of a confessio in jure (sup. p. 30). Inasmuch as, in this case, the allegation of title put forward by the fictitious plaintiff (the transferee of the right) is immediately followed in jure, before the magistrate, by the jural confession of the fictitious defendant (the transferor), no necessity, of course, arises for proceeding to a judicium, simply because there is no legal issue to decide. For the very same reason there is also no occasion for a formula, because there is no judex to appoint. The result was that in jure cessio, as long as it existed (i. e. throughout the whole classical period and even longer), retained the forms of the legis actio procedure, the particular legis actio employed being again the L. A. sacramento.

Both these facts signify one and the same thing, namely that where there is no occasion for instituting a judicium in any particular case by means of a decree of appointment, in every such case there is neither formula nor formulary procedure, and the ancient legis actio procedure holds its own[9].

[8] The decemviral court was dissolved by Augustus; otherwise it is certain (as is very happily pointed out by Mommsen, *Staatsr.* vol. ii. p. 592, note 1) that the old legis actio sacramento would have been preserved in cases coming before it (actions relating to personal freedom). Of course there was no more occasion for the use of a formula or decree of appointment for the decemviral court than there was for the centumviral court.

[9] According to Gajus, iv. 31, lege agere was still possible in later times in cases of damnum infectum (sup. p. 160). The proceedings in connection with 'apprehended damage' do not, in the first instance, constitute an action at law at all, but are merely designed for the protection of the party who is threatened, a protection which, in the old law, was apparently secured by means of pignoris capio. In place of this procedure the praetorian law substituted, not the formulary procedure, but a proceeding extra ordinem, under which the praetor, in the exercise of his official power, exacted a stipulatio, or promise of indemnity, for the purpose of saving the threatened party harmless. Here again, then, the legis actio remained in use, because in such cases, according to the praetorian law, no judex was appointed and consequently no formula was granted. In other cases of the ancient pignoris capio the praetor granted a formula on a fiction that the pignoris capio had actually taken place (Gajus, iv. 32), i. e. he instructed the judex to decide the case in the same way as though the

§ 36. The lex Aebutia and the leges Juliae did not simply abolish the legis actio procedure and substitute the formulary procedure in its place. What they did was rather this: wherever, as a matter of fact, the formulary procedure was already in practical use, in other words, wherever, as a matter of fact, the sententia of the judex already proceeded on the basis, not of the old litis contestatio, but of the magisterial formula, in those cases alone (and they formed, it is true, the great majority) the above-mentioned laws *confirmed* the formulary procedure, and at the same time swept away the fossilized relics of the concurrent legis actio procedure. But where the formulary procedure was not in use—as in the cases falling under the jurisdiction of the centumviral court and the cases of 'voluntary jurisdiction,' and damnum infectum (note 9)—the laws referred to did not introduce the formulary procedure.

Thus in matters coming before the centumviral court the old legis actio sacramento remained, but in all cases of judicia privata the formulary procedure henceforth prevailed. The change meant simply this, that henceforward the judex, in order to find an authoritative statement of the issue upon which he was to deliver his sententia, would have to look to the magisterial decree of appointment, i. e. the communication which the praetor conveyed to him in reference to the legal issue submitted to his decision. In other respects everything remained as before. The severance of jus and judicium remained, nor was the old rule altered that the magistrate's functions were restricted to introducing, allowing and formulating the issue, the final decision being reserved for the verdict of the judex. Nothing was changed except that the formal foundation of the judicium had been shifted. In effecting such a reform by means of the lex Aebutia and the leges Juliae, it is quite possible that men merely imagined they were ridding themselves of some futile and antiquated formalities, and perhaps also (at the time of the lex Aebutia) of the predominant influence of the pontifices over the legal procedure of the city of Rome. The reform, such as it was,

pignoris capio had actually been carried out, and in this way the legis actio was superseded. It is only where there is no formula, no decree of appointment, that the legis actio survives.

§ 36. was probably not regarded as possessing any unusual significance, and it is hardly to be supposed that the Romans were conscious of having accomplished anything great, more especially as the idea of a fundamental reform of civil procedure never occurred to their minds, as we see from the manner in which they treated matters appertaining to the centumviral court.

In real truth, however, the reform which had thus been carried to its conclusion, was one of the utmost importance in its far-reaching practical results.

> Gaj. Inst. IV § 30. 31 : Sed istae omnes legis actiones paulatim in odium venerunt. Namque ex nimia subtilitate veterum, qui tunc jura condiderunt, eo res perducta est, ut vel qui minimum errasset, litem perderet; itaque per legem Aebutiam et duas Julias sublatae sunt istae legis actiones effectumque est, ut per concepta verba, id est per formulas litigemus. Tantum ex duabus causis permissum est lege agere, damni infecti et si centumvirale judicium futurum est. Sane quidem cum ad centumviros itur, ante lege agitur sacramento apud praetorem urbanum vel peregrinum praetorem; damni vero infecti nemo vult lege agere, sed potius stipulatione, quae in edicto proposita est, obligat adversarium suum, idque et commodius jus et plenius est.

§ 37. *The Formula.*

The granting of the formula, i. e. the decree by which the judex, or the several recuperatores, were appointed, had now become the medium by which the litis contestatio was carried out. In other words, it formulated the legal issue for the purpose of a decision in judicio[1]. The written formula of the magistrate superseded the oral formula of the parties.

In point of legal force this new kind of litis contestatio was theoretically inferior to the solemn act of the parties in the legis

[1] As to the form of the litis contestatio in the formulary procedure, v. sup. p. 149, note 2. The formula granted by the praetor was either handed to, or occasionally dictated to, the defendant by the plaintiff.

actio procedure. An act of writing was, in the eye of the early law, an informal act devoid of all solemnity, and was therefore, in the legal sense of the jus civile, really no actio at all, i. e. it was not an act by which a person's statutable right of action was, at the same time, exercised and exhausted (sup. p. 163). As far as its nature and the law were concerned, the formula could, ipso jure civili, be retracted, repeated, or amended, if the decree of the praetor so directed. For the civil law it had simply no existence, since it was a mere creation of the jus honorarium; at civil law therefore it was not a litis contestatio at all, so that there was legally speaking (ipso jure) nothing to prevent the identical claim being brought before the praetor by action and carried on to the judicium twice over. The lex Aebutia and the two leges Juliae made the formulary procedure as applied in the judicium legitimum (p. 169) the only exception. In this particular instance the civil law had given its recognition to the formulary procedure. If a suit were commenced in the judicium legitimum with an actio in personam (§ 39) and an intentio juris civilis (§ 38), the effect was ipso jure to consume the right of action and render any repetition of the proceedings impossible, just as had been the case with the old legis actio. In all other cases however—and they formed the great majority—the praetor was obliged, in each separate instance, to insert an explicit instruction, in the shape of an express 'exceptio rei judicatae vel in judicium deductae,' in order to prevent a cause which, under the formulary procedure, had already led to the institution of a judicium, or perhaps even been carried to the final judgment, from passing through every stage of the action a second time[2]. From this it appears that it was not the action as

§ 37.

[2] GAJ. Inst. IV § 106. 107: Et si quidem imperio continenti judicio actum fuerit, sive in rem, sive in personam, sive ea formula, quae in factum concepta est, sive ea, quae in jus habet intentionem, postea nihilominus ipso jure de eadem re agi potest; et ideo necessaria est exceptio rei judicatae vel in judicium deductae. Si vero legitimo judicio in personam actum sit ea formula, quae juris civilis habet intentionem, postea ipso jure de eadem re agi non potest, et ob id exceptio supervacua est; si vero vel in rem vel in factum actum fuerit, ipso jure nihilominus postea agi potest, et ob id exceptio necessaria est rei judicatae vel in judicium deductae. Cp. GAJ. III § 180. 181. On this subject, see especially Wlassak and Eisele, *loc. cit.* On the history and form of the exceptio rei judicatae vel in judicium deductae see Lenel, *Edictum*, pp. 403, 404; Eisele, *Abhandlungen*, pp. 3 ff., 111 ff.—Since an action conducted under the formulary procedure only operated to consume the plaintiff's

§ 37. such (neither the institution of the judicium nor the sententia of the judex) which operated to consume the right of action in the early law of procedure, but solely that solemn legal act by means of which the party himself brought about the appointment of a judex, in other words, the legis actio in the strict sense of the term, the old formal litis contestatio. And this very act had been dropped in the formulary procedure. In contemplation of law, the operative force of the granting of the formula was—apart from the exception adverted to—inferior to that of the old litis contestatio.

Nevertheless this modest formula, this written notice so bald and succinct, which the praetor conveyed to the judex, contained potentially the entire future development not only of the law of Roman civil procedure, but also of Roman private law and, with it, of Roman law in general.

The ancient legis actio procedure, with its litis contestatio tied to set traditional words, offered but an extremely limited choice of ways in which to formulate the legal issue. If none of these traditional forms was strictly appropriate, the only remedy supplied by the civil law was to have recourse to the so-called 'procedure by sponsio' (agere per sponsionem). A made a formal promise (sponsio) to his opponent B that, if the allegation of fact or law put forward by B were true, he (A) would pay a sum of money. This sponsio could be enforced by a legis actio sacramento in personam (sup. p. 161), and the judicium on the sponsio would involve a judicium and sententia on the question of law or fact which formed the basis of the promise. The amount of the sponsio was never actually paid, because a sponsio of this kind (a so-called 'sponsio praejudicialis') was not designed for the recovery of a sum of money, but was merely intended to bring on an action; to serve, so to speak, as a device for forcing on legal proceedings[3].

right of action ope exceptionis, the rule was that the plaintiff might take his action again (ex integro agere) on the chance of being able to repel the exceptio rei judicatae by means of a replicatio doli (l. 25 D. de dolo 4, 3); cp. Schwalbach, *ZS. d. Sav. St.* vol. vii. pp. 122, 123.

[3] It was different with the so-called 'sponsio poenalis,' which was a sponsio on the result of an action, the parties themselves contemplating the payment of the money. On the defendant tendering a sponsio poenalis, the plaintiff had to reply with a 'repromissio,' i.e. a promise to pay the same amount if

On the other hand, there was no tradition to fetter the formula of the praetor. In the old litis contestatio the issue was formulated in narrowly prescribed terms; in the new formula the terms used were informal and freely chosen by the magistrate. The formula was thus well adapted as a means for directly submitting to the decision of a judex in judicio any question, or complex of questions, which the praetor deemed actionable. The praetor himself was now in a position, while formulating the legal issue, to give the judex at the same time direct instructions in reference to the decision of such issue. For whether the judge condemned or acquitted depended now solely on the manner in which the praetor formulated the question in dispute. § 37.

The formula was bound to become, and did in fact become, the instrument by means of which not only the wording, but also the decision of the legal issue was emancipated from the trammels of the ancient statute-law and the exclusive influence of the civil law. The formula, in a word, was the weapon by which the praetor and his jus honorarium were enabled to assert their dominant influence over the whole development of Roman law.

The legis actio and everything connected with its development and interpretation was in the hands, not of the praetor, but of the pontifices. In the legis actio procedure the judex was independent of praetorian instructions. Officially he was only bound to abide by such instructions regarding his judicium as were contained in the solemn litis contestatio of the parties, and in giving his decision on the issue thus joined, he was obliged to act in accordance with the *civil* law, and more especially in accordance with the pontifical interpretatio. In jure the magisterial power was paramount; in judicio, however, the old civil law, preserved and handed down by statute and pontifical tradition, and operating through the judex as its organ, held absolute sway. But now the relation between praetor and judex and with it the relation between the jus praetorium and jus civile was altered. The praetorian decree of appointment (formula) had come to be binding even in civil law matters. That is to say, even in civil law cases, it

defeated in the action. No repromissio was required in the case of the sponsio praejudicialis. GAJ. iv. §§ 13, 94, 171; Bekker, *Actionen*, vol. i. p. 246 ff.

§ 37. was now not enough that the judex should simply decide in accordance with the civil law; he was obliged, in the first instance, to decide on the basis of the praetorian formula, having regard always to such limitations and instructions as were conveyed in that formula. Thus within the domain of the civil as well as the praetorian law the judex became dependent on the praetor. He was bound by the instructions (formula) of the praetor to acquit the defendant even where, according to the civil law, he ought to have condemned him. In other cases he was bound conversely, in virtue of the praetor's instructions again, to condemn the defendant where the civil law would have required his acquittal (§§ 38, 40). With one stroke the judex had been converted from an organ of the civil law into an organ, in the first instance, of the praetorian law.

Through the medium of the formula the praetor was now master of the whole legal procedure, including the procedure in civil law causes, and the edict began henceforth to dominate the practice and development of the law. Apart from the centumviral causes, the enforcement, in the courts, of the civil law was now entirely subject to the limitations which the praetor in his edict thought fit to impose on it.

The lines are thus marked out upon which Roman law in the whole course of its subsequent development proceeded. It is certain that the formulary procedure obliterated, beyond recovery, the clear sharp line which had hitherto severed jus and judicium. The judex ceases to be, even for the jus civile, an independent private individual, bound by nothing but the positive law. He becomes an organ of the magisterial power and is already beginning to assume the character of a subordinate official. Thus the development of the formulary procedure was a decisive element in paving the way for the subsequent elimination of the distinction between jus and judicium (§ 44). And while thus securing full control over the judex, the praetor at the same time definitively appropriated to himself a predominant influence over the whole evolution of Roman law. The formulary procedure marks the beginning of that vigorous development of the jus honorarium, so momentous in its consequences, which resulted in the metamorphosis of the jus civile and

the birth of classical Roman law. A reform of procedure was followed by a reform of the law itself. § 37.

§ 38. *Intentio and Actio.*

Every formula commences with the appointment of the judge (Titius judex esto) or college of judges (Titius, Maevius et Lucius recuperatores sunto). This appointment—itself the origin of the formula—now only serves the purpose of an introduction to the real substance of the formula.

The formula is generally framed as an order to condemn, and consists accordingly, as a rule, of two main parts: the 'intentio' and the 'condemnatio.' The form is, in outline, as follows: If you (judex) are satisfied that such and such a right exists, or such and such a fact is true (intentio), condemn the defendant (condemnatio); if not, acquit him: si paret—condemna; si non paret, absolve. The intentio specifies the condition on which the condemnatio is to take place. It formulates the question at issue, i. e. the question which, if answered affirmatively (si paret), carries with it a verdict in favour of the plaintiff. The nature of this question and consequently the contents of the intentio determine the nature of the action. There are as many different kinds of actions as there are different kinds of intentiones.

Now the question at issue may be either one of law or of fact. Whether a thing belongs at civil law to the plaintiff, or whether the defendant is under a civil obligation to do something, is a question of law. In such cases the intentio is framed to include the words '. . . ejus esse ex jure Quiritium' or 'dare oportere,' and the actio is said to be an actio 'in jus concepta.'

But the question at issue may be merely one of fact. Civil ownership is not alleged nor civil liability. All that is alleged is some particular fact, or group of facts, to which the praetor, and he alone, has annexed a right of action. For example, it is a question of fact whether A has pledged a thing by way of hypothec to B, and if B can prove his case, he can take a real action on the pledge, but it is only the praetor, not the civil law, that gives him such a right. Again, it

§ 38. is a question of fact whether a freedman has summoned his patron before court without previous leave from the praetor, but it is a fact to which, if true, the praetor, and he alone, annexes a penal action in favour of the patron against the libertus. In these cases the intentio does not affirm any right, but simply a state of facts the truth or untruth of which determines the result of the action. An actio where the intentio is framed in this manner is called an actio 'in factum concepta'[1].

The actio in factum concepta is the instrument by which the praetor actually creates new rights unknown to the civil law, such as the rights adverted to above, viz. the right of hypothec, the right of the patron to demand the punishment of a disrespectful freedman, and so forth.

But there are other means by which the praetor attains the same purpose. He may retain the intentio juris civilis, i. e. the intentio in jus concepta, but, at the same time, modify and supplement it in a manner unknown to the civil law. He may instruct the judex to accept as a fact the existence of the civil law claim conveyed in the words 'ejus esse ex jure Quiritium' and 'dare oportere,' but to accept it subject to such conditions, as he (the praetor) thinks fit to formulate on his own responsibility. To take an instance. In Roman civil law an obligation can never be assigned. Even if the creditor sells and assigns his right to another, the right to sue does not thereby, at civil law, pass to the assignee, but continues to reside in the creditor (the assignor). The praetor, however, gives the assignee the assignor's right of action, the right, that is to say, to contend 'dare oportere' (with an intentio in jus concepta), but in so doing he modifies the intentio in such a way as to instruct the judex to treat

[1] There is also an actio in factum *civilis*, i. e. an actio in factum with an intentio *in jus* concepta. An actio in factum means, in such cases, an action for which the edict contained, as yet, no form, so that the formula had to be framed independently in each separate case. In the introductory part (the demonstratio) the actual concrete facts of the case were set out, and on the ground of these facts an intentio was granted in the following form: quidquid ob eam rem dare facere oportet (ex bona fide). The actio in factum civilis is identical with the actio praescriptis verbis (§ 66). Thus an actio in factum, simply, is an actio with an intentio in factum concepta, but an actio in factum civilis is an actio with a demonstratio in factum concepta. Cp. l. 6 § 1 C. de transact. 2, 4.

the assignee as the real creditor, and to decide accordingly. It is thus we get the so-called 'actio utilis.' An actio utilis is an action with a modified intentio. It is opposed to the 'actio directa,' in which the intentio appears in its original form, the form namely on which the intentio of the actio utilis is modelled. Thus in the example chosen the creditor or assignor has the actio directa, the assignee the actio utilis. § 38.

There is one particular form of the actio utilis which is specially important, and that is the so-called 'actio ficticia.' An actio ficticia is an actio utilis where the modification of the intentio consists in the insertion of a fiction. The judex is told to assume that a requirement of the civil law upon which the truth of the intentio depends is satisfied, in other words, he is told to disregard the fact that, in reality, the said requirement is not satisfied. The actio Publiciana in rem may serve as an illustration. It is a utilis rei vindicatio, i.e. a rei vindicatio, or action in which ownership is claimed (with an intentio: ejus esse oportere ex jure Quiritium), but a rei vindicatio with a modified intentio. If I receive a thing by purchase and delivery from a person who is not the owner of it, I do not, to begin with, acquire ownership in the thing, but I may become owner by 'usucapio' (§ 51), if I remain in possession of the thing thus bona fide acquired for a certain definite period. If this period of usucapio has expired, I have the true, the directa rei vindicatio, because I am owner. But until the period has expired I cannot have a true rei vindicatio according to the civil law, because I am not yet owner. Nevertheless, in such circumstances, the praetor is prepared, for good reasons, to grant a rei vindicatio even before the period of usucapio has run its full course, except, indeed, as against the true owner himself. And he proceeds in this way. He modifies the intentio of the rei vindicatio by inserting a fiction: the judex is told to assume (by a fiction) that the period of prescription has already expired, in other words, he is told to disregard the fact that, in reality, it has not yet expired. In short, the praetor gives to the person whose period of usucapio is still running a ficticia rei vindicatio, the so-called actio Publiciana in rem (§ 53), the intentio of which runs as follows: 'Si quem hominem Aulus Agerius emit et is ei

§ 38. traditus est, *anno possedisset*, tum si eum hominem, quo de agitur, ex jure Quiritium ejus esse oporteret. . . .' We observe then that it is an actio in jus concepta. The question at issue (intentio) is one of civil law (ejus esse oportere ex jure Quiritium), but modified in such a manner that, in spite of the civil law, the usucapio possessor is protected by means of the action in precisely the same manner as if the period of prescription had run its full course. The usucapio possessor then has also a rei vindicatio, but it is a utilis rei vindicatio (the actio Publiciana). It is probable that the actio ficticia was the oldest form of the actio utilis. The praetor, in these cases, though really developing the civil law, nevertheless adhered to it as closely as he possibly could.

But the antithesis between actio directa and actio utilis is not only applicable to actiones in jus conceptae, but also and in an equal degree to actiones in factum conceptae, although in dealing with the latter the praetor was, from the outset, acting within the limits of his special sphere of power. Suppose a certain state of facts to which the praetor has annexed a right of action, and suppose it to become desirable, in the interests of justice, to annex the same right of action to another state of facts, not indeed identical with, but closely analogous to, the former one. What the praetor did was this: taking the action which was designed for the state of facts originally contemplated, he adapted it to the new case that had arisen by introducing a modification into the intentio in which, in such instances, the facts were set out. The former action was the actio directa, the latter the actio utilis. A good illustration is to be found in the case of the actio hypothecaria. The only case in which, in the first instance, a pledgee was given a real action against the pledgor who was in possession of the thing pledged, occurred when a tenant farmer of a praedium rusticum pledged his farming stock, his 'invecta and illata,' to his landlord as security for his rent. In such a case the landlord's right of pledge was protected by the 'actio Serviana.' It soon appeared however that it was desirable, in the interests of equity, to extend the advantages of an action of this kind from landlords to pledgees of every description. Hence pledgees other than landlords were given the actio Serviana utilis or

actio quasi-Serviana; in other words, they acquired the same right as landlords to sue on pledges, the only difference being that in their case the intentio appeared of course in a modified form. § 38.

Thus the actio directa is the original on which another action is modelled, and this other action—the actio utilis—is the copy.

Actiones utiles, like actiones in factum, are praetorian actions (actiones honorariae), i. e. their source is the jus honorarium. On the other hand, an actio directa may be either an actio civilis (viz. when it is grounded on the civil law) or an actio honoraria (as when an actio utilis is moulded on an actio in factum).

The actio utilis, like the actio in factum concepta, is always symptomatic of legal progress, whether the law affected be the civil or the praetorian law.

Both these forms of action, the actio utilis and actio in factum concepta, are illustrative of the power which the praetor exercised, in the first instance, over the judex and, through him, over the development of the law in general. The subordination of the judex to the praetor binds him to abide by the instructions he has received and to condemn the defendant in an actio in factum or an actio utilis, in spite of the fact that the requirements of the civil law have not been fulfilled.

The contrasts with which we have hitherto been dealing—actio civilis and honoraria, actio in jus and in factum concepta, actio directa and utilis—are contrasts of a purely formal kind. They are based on the external relation in which the intentio stands to the civil law, on the one hand, and the praetorian edict on the other; in other words, on the external relation of the intentio to the positive law.

But the intentio possesses a much greater interest when viewed in reference to its matter, i. e. when viewed in reference to the *rights* which claim to be realized through the medium of the intentio. When regarded from this point of view, the various classes of intentiones are found to exhibit the whole system of actions, a system which is, itself, but a reflex of the system of private law.

Gaj. Inst. IV § 41: Intentio est ea pars formulae, qua actor

§ 38. desiderium suum concludit, velut haec pars formulae: SI PARET N. NEGIDIUM A. AGERIO SESTERTIUM X MILIA DARE OPORTERE; item haec: QUIDQUID PARET N. NEGIDIUM A. AGERIO DARE FACERE OPORTERE; item haec: SI PARET HOMINEM EX JURE QUIRITIUM A. AGERII ESSE.

§ 45 eod.: Sed eas quidem formulas, in quibus de jure quaeritur, in jus conceptas vocamus, quales sunt, quibus intendimus NOSTRUM ESSE ALIQUID EX JURE QUIRITIUM, aut NOBIS DARI OPORTERE, aut PRO FURE DAMNUM DECIDI OPORTERE: in quibus juris civilis intentio est. § 46: Ceteras vero in factum conceptas vocamus, id est, in quibus nulla talis intentio concepta est, sed initio formulae, nominato eo, quod factum est, adjiciuntur ea verba, per quae judici damnandi absolvendive potestas datur; qualis est formula, qua utitur patronus contra libertum, qui eum contra edictum praetoris in jus vocavit, nam in ea ita est: RECUPERATORES SUNTO. SI PARET ILLUM PATRONUM AB ILLO LIBERTO CONTRA EDICTUM ILLIUS PRAETORIS IN JUS VOCATUM ESSE, RECUPERATORES ILLUM LIBERTUM ILLI PATRONO SESTERTIUM X MILIA CONDEMNATE: SI NON PARET, ABSOLVITE. . . . . et denique innumerabiles ejusmodi aliae formulae in albo proponuntur. § 47: Sed ex quibusdam causis praetor et in jus et in factum conceptas formulas proponit, veluti depositi et commodati: illa enim formula, quae ita concepta est: JUDEX ESTO. QUOD A. AGERIUS APUD N. NEGIDIUM MENSAM ARGENTEAM DEPOSUIT, QUA DE RE AGITUR, QUIDQUID OB EAM REM N. NEGIDIUM A. AGERIO DARE FACERE OPORTET EX FIDE BONA, EJUS JUDEX N. NEGIDIUM A. AGERIO CONDEMNATO, NISI RESTITUAT; SI NON PARET, ABSOLVITO, in jus concepta est; at illa formula, quae ita concepta est: JUDEX ESTO. SI PARET, A. AGERIUM APUD N. NEGIDIUM MENSAM ARGENTEAM DEPOSUISSE, EAMQUE DOLO MALO N. NEGIDII A. AGERIO REDDITAM NON ESSE, QUANTI EA RES ERIT, TANTAM PECUNIAM JUDEX N. NEGIDIUM A. AGERIO CONDEMNATO; SI NON PARET, ABSOLVITO, in factum concepta est. Similes etiam commodati formulae sunt.

§ 39. *The System of Actions.*

I. Actiones in personam and Actiones in rem. § 39.

Every intentio is so framed as to be either personal (in personam) or impersonal (in rem). An intentio in personam names the person of the defendant (who is on certain conditions to be condemned), an intentio in rem does not name the person of the defendant but only the person of the plaintiff, in other words the person who claims the right. Upon this antithesis is based the supreme division of all actions into actiones in personam, where the intentio is in personam, and actiones in rem, where the intentio is in rem.

The antithesis is not merely an external one, but is grounded on a fundamental difference in the nature of private rights themselves. The so-called obligatory rights, which form one class of private rights, are rights co-extensive with the liability of a single person, viz. the debtor, and it is impossible to specify the concrete obligatory right without, at the same time, specifying this particular person. The person of the opponent (the debtor), and therewith the person of the defendant, is pointed to and marked out, as it were, by the very nature of the plaintiff's right. The intentio, whether in jus or in factum concepta, must name the person of the debtor, because he (the debtor) in a sense individualizes the right. Where there is a different debtor, the right itself is different. The intentio thus runs, e. g. si paret N^{um}. N^{um}. A^{o}. A^{o}. dare oportere. All other rights, on the other hand, more especially, though not exclusively, real rights like ownership, do not consist in the liability of one definite person, but are rights which not only subsist, but can, if necessary, be enforced against everybody. Rights of this description are not, as such, available against any one definite person. It is only when the plaintiff's right is violated, but not till then, that the person against whom his right is available, in other words, the person of the defendant is determined. And the plaintiff has the same right of action, on the ground of the same right, every time this right of his is violated. The right remains the same, however different the parties against whom it is enforceable. In such cases

§ 39. the intentio is impersonal (e. g. si paret hominem quo de agitur A^i. A^i. esse ex jure Quiritium), i. e. it does not specify the defendant, whose name does not appear till the condemnatio.

Thus the nature of the intentio determines the nature of the actio.

An action arising from an obligatory right is an actio in personam, an action arising from any other right (ownership, right of pledge, paternal power, right of succession, &c.) is an actio in rem. Or, to put it in terms of private law: an obligatory right is a right the content of which is relative as against a definite person, the remaining rights are rights the contents of which are absolute.

II. Actiones in rem.

Real actions (actiones in rem) arise either from real rights (infra, § 47 ff.), such as ownership (rei vindicatio, actio negatoria), or from family rights, such as the power of the paterfamilias over his children (vindicatio filii in potestatem), or from rights of succession (hereditatis petitio, interdictum quorum bonorum), or from rights of 'status,' i. e. rights to a recognition of one's personal standing (e. g. of one's ingenuitas, parentage, freedom from patria potestas). The actions on status belong to the so-called 'actiones praejudiciales,' i. e. those actions of Roman law the object of which was to obtain, not the condemnation of the defendant, but merely a judicial acknowledgment of a legal relation, such as liberty[1].

The so-called 'actio in rem scripta' is not an actio in rem, but an actio in personam, springing from an obligation and available, therefore, against an existing defendant, but with this peculiarity that the debtor is not specifically determined, but is only characterized by a general description to which different persons may answer at different times. It is therefore an actio in personam where the person of the debtor varies from time to time. An example would be the actio quod metus causa (p. 135), by which a man who has concluded a juristic act under the influence of fear, claims to recover the property he has involuntarily parted with from any one who is now, for the time being, in actual enjoyment of the

[1] For more details on the praejudicia v. Bekker, *Actionen*, vol. i. p. 283 ff.

benefits accruing from the act in question, e. g. the person who is now, for the time being, owner of the thing which was alienated metus causa. The effect of the action is real (i. e. it is 'in rem scripta'), in so far as it is directed not only against the author of the metus, but also against any third party to whom the former may have transferred ownership in the thing; but on the other hand the action is not a real action, because the plaintiff cannot rest his claim against the third party on his ownership (the defendant himself being owner), but must rest it on an obligation, springing from the metus and aiming at the retransfer to the plaintiff of the ownership he had involuntarily given up. Another example occurs in the case of a partition suit where one co-owner of property claims the partition of the joint property from such other person as is, for the time being, co-owner of the same property. § 39.

III. Actiones in personam.

Obligations arise either from contracts (or facts analogous to contracts), or from delicts (or facts analogous to delicts). Hence all actions in personam are either contractual (or quasi-contractual) or delictual (or quasi-delictual) (§ 64).

IV. Actiones stricti juris and Actiones bonae fidei.

Contracts are either negotia stricti juris or negotia bonae fidei according as the liability involved is precisely determined or not (§ 63). Hence all contractual actions are either actiones stricti juris (actions on loans, stipulationes, &c.) or actiones bonae fidei (actions on sales, lettings, bailments, &c.). An actio stricti juris is called a condictio if the formula does not state the cause of the action (§ 67, n. 5).

The intentio in an actio bonae fidei is always incerta (quidquid Num. Num. Ao. Ao. dare facere oportet ex bona fide), the intentio of an actio stricti juris is only incerta, when the express object of the negotium stricti juris is an incertum. In cases of an incerta intentio (i. e. in all cases of bonae fidei actions) the intentio opens with a so-called 'demonstratio,' i. e. with the naming of the contract from which the claim for the incertum (the quidquid) arises. For example: quod Aus. Aus. apud Num. Num. hominem deposuit, quidquid, &c.

§ 39. V. Actiones ex delicto.

A delict may render the delinquent liable to pay either compensation or a penalty or both, and in the last case the same action may be available for the double purpose of claiming compensation and exacting the penalty, or again, the delict (e. g. theft) may give rise to two independent actions: one for the recovery of compensation (e. g. the condictio furtiva), the other for the recovery of a penalty (e. g. the actio furti). Hence all delictual actions are either rei persequendae causa comparatae (reparatory), or poenae persequendae causa comparatae (penal), or mixtae (reparatory and penal).

The right to sue for the penalty consequent on the commission of a delict may either be confined to the person injured or may be open to everybody (cuivis ex populo). Hence all penal actions (actiones poenae persequendae causa comparatae, actiones poenales) are either private (open only to the injured party), or 'populares.'

§ 1 I. de actionibus (4, 6): Omnium autem actionum, quibus inter aliquos apud judices arbitrosve de quaque re quaeritur, summa divisio in dua genera deducitur: aut enim in rem sunt aut in personam. Namque agit unusquisque aut cum eo, qui ei obligatus est vel ex contractu vel ex maleficio: quo casu proditae sunt actiones in personam, per quas intendit adversarium ei dare aut dare facere oportere, et aliis quibusdam modis; aut cum eo agit, qui nullo jure ei obligatus est, movet tamen alicui de aliqua re controversiam: quo casu proditae actiones in rem sunt, veluti si rem corporalem possideat quis, quam Titius suam esse affirmet, et possessor dominum se esse dicat: nam si Titius suam esse intendat, in rem actio est.

§ 13 eod.: Praejudiciales actiones in rem esse videntur: quales sunt, per quas quaeritur, an aliquis liber vel an libertus sit, vel de partu agnoscendo.

§ 20 eod.: Quaedam actiones mixtam causam optinere videntur, tam in rem quam in personam: qualis est familiae erciscundae actio, quae competit coheredibus de dividenda hereditate. Item communi dividundo, quae inter eos redditur, inter quos aliquid commune est, ut id dividatur; item finium regundorum, quae inter eos agitur, qui confines agros habent.

§ 40. *Condemnatio and Exceptio.*

§ 40.

I. Condemnatio.

The condemnatio is the clause in the formula in which the praetor orders the judex to condemn the defendant. The condition on which the condemnatio is to take place is contained in the intentio. If the intentio is true, the judex is to condemn. It is only in the actiones praejudiciales (p. 186) that the formula consists of nothing but an intentio, a condemnatio not being needed, because, in such cases, the sole purpose of the formula is to require the judex to pronounce upon the specific question (say, of status) submitted to him (pronuntiatio).

The gist of the condemnatio, as ordered by the praetor, invariably lies in a money payment to be imposed by the judex (pecuniaria condemnatio), even in cases where the plaintiff has established a claim to the restitution (restituere) or production (exhibere) of a definite object which is in the possession of the defendant.

The only claims which, not only in the earlier but also in the classical period of Roman law, admitted of direct judicial execution are liquidated money debts. Hence the judex, in liquidating the plaintiff's claim by means of his judgment, is bound to convert this claim at the same time into a claim for a pecuniary sum.

But the pecuniaria condemnatio frequently operates unfairly, more especially in such cases as those just adverted to, viz. suits where the plaintiff claims the restitution or production of property. The plaintiff may, for example, have successfully proved that he is owner of some object which the defendant withholds from him. Nevertheless, inasmuch as the defendant is merely condemned in a sum of money, he (the plaintiff), though he has clearly established his title as owner (rei vindicatio), does not recover the object which belongs to him, but merely the pecuniary damages paid him by the defendant. The result is that the defendant, though defeated in the suit, nevertheless remains in possession of the object. Nay, what is more, in the very same moment in which he pays the

§ 40. plaintiff the damages (quanti ea res est), he becomes, in praetorian law, owner of the thing. The upshot of the action in which the plaintiff successfully establishes his ownership is that he (the plaintiff) is expropriated and loses his ownership. And there are numerous other instances where the same rule produces the same unsatisfactory result. Thus a usufructuary who (by the actio confessoria) has established his right to the restoration of the object of the usufruct; a pledgee who (by the actio in rem hypothecaria) has made good his claim to the restoration of the object pledged; a letter who (by the actio locati) has proved his right, after the expiry of the term of letting, to have the object he let out returned to him; a commodator who (by the actio commodati directa), or a depositor who (by the actio depositi directa) claims the restitution of the object he lent or deposited for safe custody respectively; a pledgor who, after discharging the debt for which he gave the pledge, claims (by the actio pignoraticia directa) that the pledgee should return him the object pledged; a person who having parted with property under the influence of dolus or metus, claims (by the actio de dolo or the actio quod metus causa, respectively) to have the property thus wrongfully obtained restored to him; an heir who (by hereditatis petitio) contends that the merely supposititious heir should make over to him the inheritance of which the former has taken possession; an owner who with a view to taking a rei vindicatio sues by the actio ad exhibendum for the production of the object which the defendant has in his possession, in order to be able to establish its identity with the object which he himself is missing; in every one of these and in other cases, the plaintiff, though successful, finds himself in the same unsatisfactory position. In all the instances given the claim is for the restitution or, in the last case, for the production of property, but even if the action is successfully carried through, the result of the principle of a mere pecuniary condemnation is that the plaintiff's claim is, in effect, not satisfied, but merely settled.

The same unsatisfactory result ensues where a purchaser claims by the actio redhibitoria to have a contract of sale rescinded, on the ground, say, of latent defects in the article purchased. The money condemnation only gives him a sum representing his interest in the

rescission of the contract (quanti ea res erit), but not what he is really entitled to demand, viz. the rescission itself, which would involve, on the part of the purchaser, the return of the article purchased, and, on the part of the vendor, the refunding of the price paid, or else a discharge from all obligations under the sale. Thus, in spite of the condemnation of the defendant, he (the plaintiff) is forced, say, to keep the animal purchased, which he has, perhaps, found to have some infectious disease. § 40.

Even in the case of a noxal action, it is quite conceivable that the condemnatio might not do justice to the interests of the plaintiff. If a slave commits a delict, the master becomes liable, he being given the option either of taking the consequences of the delict on his own shoulders (paying a fine and damages), or else of surrendering the slave to the party injured by the delict (noxae deditio). But take the case of an 'injuria.' A slave has used abusive language to the plaintiff. The condemnatio directs the master either to surrender the slave or pay a small sum of money. The master will naturally adopt the second course. But such a form of redress gives the plaintiff but scant satisfaction. The money is of no use to him. The requirements of the case would be far more adequately met, if instead of money being paid, the slave were ordered to be flogged by way of punishment.

The common feature in all these cases is this, that the pecuniary condemnatio is incapable of really satisfying the just demands of the plaintiff.

A difficulty of a different kind arose in the case of the negotia stricti juris, i. e. in those transactions (e. g. the stipulatio, § 67) in dealing with which a strict and literal interpretation is always adopted. If, for example, the promisor in a negotium stricti juris had undertaken to do something at a certain place (if, e. g., he had bound himself by stipulatio: Ephesi centum dare), the performance of the promise could only be demanded at that particular place, nor could the defendant be condemned at any other place. For the defendant had never promised to perform anywhere else, and if the creditor sued him elsewhere, he was demanding something different from what he had been promised (plus petitio), and was bound to lose his

§ 40. action. On the other hand, it was perhaps practically impossible for the plaintiff to prosecute his suit at the place in question (say, Ephesus), because the defendant persistently avoided going there, and legal proceedings against a defendant who was absent were unknown in the older law. Here was a case where the creditor might reasonably ask for some redress. The interests of justice required that he should have the right to sue at a different place, provided that if he did so, he should not of course be entitled to claim the literal performance of what had been promised him, but only an amount representing his interest in such performance, the advantages or disadvantages of the specified locality being taken into consideration in assessing such amount. To attain this end, however, the form of the condemnatio had to be modified. For, in an actio stricti juris, the defendant was never condemned to pay an amount representing the interest which the plaintiff had in the performance of the act, but simply the absolute value of the act as expressed in a pecuniary sum. Thus, if the plaintiff in an actio stricti juris (condictio certi) sued for a specified amount, the sum laid in the condemnatio was not a sum equivalent to the special value to the plaintiff of the amount in question, but precisely the specified amount itself, neither more nor less[1]. It was the same where the plaintiff sued, not for a sum of money, but for the delivery of a definite thing or for any other act which had been promised by a negotum stricti juris. All the successful plaintiff, proceeding by an actio stricti juris, could have awarded to him was the objective value of the particular thing or act, and not his own peculiar interest in one or the other. And this objective value he could recover nowhere but at the very place at which the act had been promised. If he sued at any other place, he would be suing for something which was not due to him, and would consequently be defeated in his action.

We see, then, that in the first class of actions mentioned above,

[1] When, for instance, performance was delayed, the plaintiff was not entitled to have the loss he suffered in consequence of such delay (e. g. the loss of interest on money) considered in assessing the amount payable by the defendant. For the same reason the benefits, or otherwise, accruing from a particular place could not be taken into account.

where restituere or exhibere is claimed, and in the same way in the actio redhibitoria, and practically also in the specified instance of the noxal action, the injustice consisted in the fact that the defendant could only be condemned in a pecuniary sum representing the plaintiff's interest, and could not be condemned to give the plaintiff specific satisfaction, whereas, conversely, in the actiones stricti juris the injustice consisted in the fact that the defendant could not be condemned to pay a sum representing the interest of the plaintiff, but only a sum representing the absolute value of the act. § 40.

These cases embraced elements of the greatest variety, but in every one of them the evil, such as it was, was attributable to the narrowness of the condemnatio—narrow, that is to say, either in the sense that the condemnatio was a mere money condemnatio and nothing else, or (as in the case of the actiones stricti juris) in the sense that the money condemnatio was hedged in within certain narrow limits. The praetor was consequently in a position to apply the same remedy to all such cases alike, the remedy namely of modifying the condemnatio. He gave the judex the power to pronounce not merely a condemnatio, but also, if he saw fit, an 'arbitrium,' i. e. a decision determined by the particular circumstances of the case. An arbitrium is a judgment enlarged in scope and freed from the trammels which beset the mere condemnatio.

Thus, for example, in actions relating to ownership and other similar actions, where a restituere or exhibere is asked for, the justice of the case will be best consulted, if the defendant is required to give the plaintiff specific satisfaction. As soon, therefore, as the plaintiff's ownership or other right has been established (pronuntiatio), an arbitratus (jussus) de restituendo or de exhibendo is addressed to the defendant. If he disregards it, execution, it is true, does not issue. For neither in the early nor in classical Roman law was execution possible for any but a money debt—which is just the very reason why a money condemnatio is the only true condemnatio. Instead of execution, however, condemnatio follows, and, if the defendant intentionally neglects to comply with the order, the judge calls upon the plaintiff to affirm on oath (jusjurandum in litem) the value to him of having the thing restored. If the defendant

§ 40. has acted in wilful contempt of the arbitratus de restituendo, it is most probable that the judge, on the strength of the plaintiff's oath, will condemn the defendant in a sum far in excess of the actual value of the thing. In other words, a money condemnatio, when preceded by an arbitratus de restituendo, becomes an instrument for punishing a contumacious defendant. By this means, a mode of execution was secured for the arbitrium de restituendo, which, though only indirect, was none the less effective, and, as far as the vast majority of cases was concerned, undoubtedly removed the injustice of the pecuniaria condemnatio.

The actio redhibitoria was treated in the same way. Before proceeding to the condemnatio the judge would pronounce an arbitrium to the effect that the purchaser should restore the object purchased, together with its accessions, and that the vendor should refund the purchase money he had received or discharge the purchaser from his liability under the sale, as the case might be. If the vendor, without good cause, failed to obey the arbitrium, the judex proceeded to condemn him to pay double the value (l. 45 D. 21, 1). And, on the same principle, where a noxal action was taken on the ground of an insult by a slave (actio injuriarum noxalis), the judex, before condemning the master, called upon him by arbitratus to surrender his slave with a view to the infliction of corporal punishment to an extent determined by the judex. If he failed to comply, the judex would (most probably) increase the fine he imposed [2].

In cases of actiones stricti juris, where the object was to obtain a condemnatio of the defendant at a different place, the matter was simpler still. The praetor empowered the judex to pronounce an arbitrium, by which he condemned the defendant to pay a sum representing the plaintiff's interest in the performance, the locality being thus taken into consideration. In this case the arbitrium was

[2] On both these cases v. Lenel, *Edictum*, pp. 438, 324. If the defendant complied with the arbitrium, he was not condemned, so that, in the case of the actio redhibitoria, he escaped all further consequences by refunding the simplum (scil. pretium). That such is the meaning of l. 45 D. 21, 1 is shown by Bechmann, *Der Kauf*, vol. i. p. 403, and Eck, *Das Ziel der actio redhibitoria* (*Juristische Abhandlungen für Beseler*, 1885).

substituted for the condemnation. The defendant was not simply condemned to do what he had bound himself to do, but was ordered by arbitratus to satisfy the interest of the plaintiff, the judex being authorized to take into account the advantages and disadvantages accruing to the plaintiff and defendant respectively from the particular place in question. Thus, if the performance at some place other than the place promised was more advantageous to the plaintiff than performance at the place promised, the defendant might conceivably be condemned to pay less at this other place than he had actually promised. In this case the arbitrium was followed, not by the condemnatio, but by execution. An arbitrium of this kind admitted of execution, because it ordered a direct money-payment [3]. § 40.

We have now determined the conception of an actio arbitraria. It is an action in which the order to condemn is framed in terms of considerable latitude. The position of the judex is less fettered, because he is authorized to pronounce an arbitratus. It is in this sense that the actions referred to are actiones arbitrariae, viz. the actions claiming restituere and exhibere, the actio redhibitoria, the noxal action for an insult by a slave, as well as the action on a negotium stricti juris where the plaintiff asks for the amount of his interest (the locality being taken into account). In all these cases the remedy resorted to for obviating an injustice is the same, to wit, a modification of the condemnatio.

Thus, in the formula for an action claiming the restitution or production of property, the direction to condemn was preceded by a clause authorizing the judex to make an arbitratus de restituendo or de exhibendo. The instructions did not run simply: condemna, but: neque (nisi) arbitratu tuo restituetur (exhibebitur), condemna. The defendant could only be condemned (in a money payment) after the order to restore (the 'arbitrium') had been issued and disregarded [4]. Similarly in the actio redhibitoria the condemnatio

[3] Cp. Lenel, *Edictum*, p. 193 ff.

[4] The term restituere covers a variety of acts differing in different actions. Thus restituere includes also the delivery-up of the mesne profits produced by the object in question, the assignment of rights of action which have arisen in reference to it, &c. When the possessor of an inheritance, after being defeated in a hereditatis petitio, is ordered to 'restore' the inheritance, such an order may involve the pay-

§ 40. was preceded by a clause: si arbitratu tuo is homo (viz. the purchased slave) redhibebitur (by the purchaser) . . . et . . . pecunia non reddetur (by the vendor); and in the noxal action above referred to it was preceded by a clause: nisi arbitratu tuo servum verberandum exhibebit (or some such words).

An action where the plaintiff, suing on the ground of a negotium stricti juris in which the place of performance is specified, claims the amount of his interest in such performance, is called by modern civilians the 'arbitraria actio de eo quod certo loco.' The Romans called it the 'actio arbitraria' simply, applying the term, not, as in the case of the other actiones arbitrariae, in a generic sense, but as a specific name[5]. It was *the* actio arbitraria, because, as already stated, it always resulted in an arbitrium and never in a condemnatio, in the technical sense of the term. The formula merely instructed the judex to decide according to his own arbitratus, i. e. his own equitable discretion, and to award either the amount actually promised, or a larger or a smaller sum, according as he saw fit.

Thus in the actiones arbitrariae greater latitude was allowed to the judex in the same way as in the actiones bonae fidei. But there was this distinction that, in the actiones bonae fidei, the judex exercised a wider discretion in virtue of the intentio, in the actiones arbitrariae in virtue of the condemnatio. In other words, in an actio bonae fidei the very nature of the plaintiff's right which forms the subject-matter of the suit, requires the judex to act on his own discretion; in an actio arbitraria, on the other hand, it is the command of the praetor that requires him to do so, i. e. the praetor's order to condemn, in the modified form which in such cases it assumes. It is quite possible that one and the same action may be both bonae fidei and arbitraria, but, if so, it is the intentio that makes it bonae fidei, the condemnatio that makes it arbitraria.

Gaj. Inst. IV § 48: Omnium autem formularum, quae condem-

ment, by such possessor to the real heir, of a debt which he (the possessor) owed to the deceased, or it may involve the surrender 'noxae causa' of a slave who has committed a delict (e. g. an act of damage or a theft) against some property belonging to the inheritance (cp. l. 40 § 4 D. 5, 3). Cp. also note 6.

[5] Cp. Lenel, *Edictum*, p. 195.

nationem habent, ad pecuniariam aestimationem condemnatio concepta est. § 40.

§ 31 I. de act. (4, 6): Praeterea quasdam actiones arbitrarias, id est ex arbitrio judicis pendentes, appellamus, in quibus, nisi arbitrio judicis is, cum quo agitur, actori satisfaciat, veluti rem restituat vel exhibeat vel solvat vel ex noxali causa servum dedat[6], condemnari debeat. Sed istae actiones tam in rem quam in personam inveniuntur. In rem, veluti Publiciana, Serviana de rebus coloni, quasi Serviana, quae etiam hypothecaria vocatur. In personam, veluti quibus de eo agitur, quod aut metus causa aut dolo malo factum est. Item qua id, quod certo loco promissum est, petitur. Ad exhibendum quoque actio ex arbitrio judicis pendet. In his enim actionibus et ceteris similibus permittitur judici ex bono et aequo secundum cujusque rei, de qua actum est, naturam aestimare, quemadmodum actori satisfieri oporteat.

II. Exceptio.

In the actiones arbitrariae we have a modification of the condemnatio which operates to enlarge the judge's powers in regard to such condemnatio; in the exceptiones, on the other hand, we have, as the name denotes, an exception to the condemnatio which operates to restrict the judge's powers in regard to the condemnatio.

The normal state of the case is this: if the intentio is true, the judge must condemn. The effect of an exceptio is that, contrary to the general rule, the judge does not condemn notwithstanding the truth of the intentio. The praetor forbids him to condemn, if the exceptio is proved, in spite of the fact that, in itself, the truth of the intentio would require a condemnatio. The materiality of the facts pleaded by means of the exceptio is thus invariably determined by the praetor in the express instructions which he conveys to the judex. Hence the opposition between a defence operating 'ope exceptionis,' and a defence operating 'ipso jure.' Whenever the defendant claims a verdict on the ground of the wording of the

[6] For an explanation of these words v. note 4.—The noxal action as such is not an actio arbitraria. It does not contain an arbitrium, and the condemnatio runs: aut tantam pecuniam aut in noxam dedere. It was only in the exceptional case mentioned in the text that the condemnatio was preceded by an arbitratus de verberando.

§ 40. intentio, he is relying on a defence which operates ipso jure; whenever he claims a verdict on the ground of the wording of the condemnatio, in other words, on the ground of an exception expressly inserted in the instructions to condemn, he is relying on a defence which operates ope exceptionis. This is the reason why a defence which operates ope exceptionis must be pleaded in jure, in the first stage of the proceedings, before the magistrate, in other words, why a defendant who relies on such a plea must apply to have an exceptio expressly inserted in the formula. A defence, on the other hand, which operates ipso jure (by virtue of the intentio itself), may be set up in judicio before the appointed judge, even where the defendant has omitted to plead it in jure.

The essence of the exceptio lies in the expression which it gives to the opposition between the praetorian and the civil law. For example: the plaintiff has been promised 100 aurei in some negotium stricti juris (say, a stipulatio), in a transaction, that is to say, the obligations arising from which are rigorously and literally interpreted. He has, however, subsequently released the debtor by an informal act, a 'pactum de non petendo.' In such a case the pactum de non petendo is void by civil law; by praetorian law, however, it is valid. The plaintiff now takes his action, an actio stricti juris (condictio certi). The intentio runs: 'Si paret N^{um}. N^{um}. (the debtor) A^{o}. A^{o}. (the creditor) C dare oportere.' This intentio is true, for by the civil law (dare oportere) the debtor still owes the creditor 100 aurei, notwithstanding the pactum de non petendo. The defendant therefore would have to be condemned. The praetor, however, inserts in his order to condemn an exception to this effect: si inter A^{um}. A^{um}. et N^{um}. N^{um}. non convenit, ne ea pecunia peteretur (the so-called 'exceptio pacti de non petendo'). If therefore the debtor can prove the pactum de non petendo, the judex is bound, after all, by the praetorian instructions, to find a verdict for the defendant. In much the same way a person who is sued on a civil law claim may, by means of an exceptio, plead fraud (exceptio doli) or intimidation (exceptio metus) on the part of the plaintiff, or may plead a compromise (exceptio transactionis), or an oath sworn by him to the effect that the plaintiff has no claim (exceptio jurisjurandi). The

civil law, on principle, excludes the consideration of all such circumstances. If the defendant were to plead that he had paid his debt, he would be entitled to a verdict ipso jure and would not need any exceptio at all; the intentio itself would require his acquittal, for the 'dare oportere' would no longer be true. But according to the principles of the civil law the obligation conveyed in the words 'dare oportere' is not affected by fraud, intimidation, &c. The truth of the intentio is not touched, and the defendant will have to be condemned. The praetor, however, helps him by means of an exceptio, and orders the judge not to condemn, although, according to the civil law, he ought to condemn. In the same way therefore as the actio in factum and the actio utilis are instruments by means of which a condemnation is secured in contravention of the civil law, so the exceptio is an instrument by means of which an acquittal is secured in contravention of the civil law. The exceptio is, in short, the means by which effect is given to the equitable defences of the jus honorarium. § 40.

The same point of view is equally applicable to other cases which seem, at first sight, to present a somewhat different aspect.

The civil law, namely, while forbidding certain juristic acts, did not always, at the same time, declare that every act concluded in spite of such prohibition should be null and void. For example, the lex Cincia (204 B.C.) forbids certain kinds of gifts (sup. p. 138). A gift, however, which was made in contravention of the statute, was nevertheless valid at civil law. It was the praetor who gave effect to the prohibition contained in the lex Cincia by granting an exceptio legis Cinciae. Again the SC. Vellejanum (46 A.D.), while prohibiting the 'intercessio' of women, i. e. while prohibiting women from taking upon themselves the debt of a third party, nevertheless left it to the magistrate, in the exercise of his jurisdiction, to give practical effect to this prohibition[7]. The praetor did so by granting to a woman who was sued in respect of her intercessio (e. g. in respect of a suretyship) the exceptio SC^{i}. Vellejani. In the same way we have an

[7] The words of the senatusconsultum ran: arbitrari senatum, recte atque ordine facturos, ad quos de ea re in jure aditum erit, si dederint operam, ut in ea re senatus voluntas servetur.—Exactly the same method was followed in the SC. Trebellianum and Pegasianum, infra § 104.

§ 40. exceptio legis Plaetoriae (§ 43), an exceptio SC^i. Macedoniani (§ 66), &c. In all such cases what happened was this: the praetor acted on the specific instructions laid down by an authoritative organ of the civil law in regard to the particular form which his jus honorarium should assume (sup. p. 55). But the organ itself had done nothing more than lay down a rule of *public* law (in precisely the same manner as in the case adverted to above, p. 56, n. 13), i. e. it had not enunciated a legal rule operating directly on the private law, but had merely bound the magistrate, who was charged with the administration of justice, to observe a definite course in the exercise of his imperium. Exceptiones of this kind are called by modern writers 'civil' exceptiones. By a civil exceptio, then, we mean an exceptio whose purpose it is to give effect to a rule of the public civil law. Nevertheless, even in these cases the acquittal of the debtor at private law is due, not to the jus civile, but to the jus honorarium. For as far as the private civil law is concerned, the transactions referred to (the gift, the woman's suretyship, &c.) are perfectly valid, and it is only through the medium of the praetorian law that the civil law principle operates to acquit the debtor. This is the reason why in such cases the praetor is bound to give the judex explicit instructions not to condemn, why, in other words, the existence of an exceptio must be expressly stated, for in default of such instructions the civil law would compel the judex to condemn. Like other exceptiones, then, a so-called civil exceptio is a legal plea on the ground of which the defendant claims to be acquitted, and which operates as a ground of acquittal in virtue of the jus honorarium alone [8].

So far we have always taken the formula in jus concepta as our starting-point, the formula, that is to say, where a claim grounded on the civil law is stated as the condition on which the condemnatio is to take place, and where the relation subsisting between the intentio and condemnatio affords an illustration of the relation of the praetor to the civil law. For where the condemnatio is unqualified, i. e. where there is no exceptio, there the praetor is in harmony with

[8] It is against the form in which this point was put in the second edition of the original that the criticisms of Wendt (*Pandekten*, pp. 264, 265) are directed.

the civil law[9]; where the condemnatio is qualified by an exceptio, there the praetor is in conflict with the civil law. § 40.

Matters stood differently with the formula in factum concepta, that is to say, with the formula where the condemnatio was made conditional on a mere question of fact, stated in the intentio, e. g. on the question whether the patron had been summoned before court by the freedman without the consent of the praetor. In such cases the effect of an unqualified order to condemn is always to estop the defendant from making any defence (unless, of course, it be a denial of the fact itself). Even though he may have actually paid his adversary and thus, beyond all doubt, extinguished every claim which the latter might have had against him, nevertheless, if the condemnatio is unqualified, judgment is bound to go against him, provided only the truth of the fact with which the suit is concerned is established. If therefore the defendant wishes to plead payment, he must have an 'exceptio solutionis' inserted, which would be impossible, if the intentio were juris civilis. In actiones in factum, whatever the ground may be on which the defendant claims a verdict, he must, in order to be able to plead such defence, reserve his right to do so by means of an express exceptio. Thus, where the intentio is in factum concepta every defence must be expressly pleaded by means of an exceptio, and the necessity for an exceptio arises in all such cases, not from the material nature of the law, in other words, not from the legal force incident to the defence as such, but solely from the formal narrowness of the intentio in factum concepta. When the matter at issue, and the condition on which the condemnatio depends, are nothing more than a question of fact, as such, the formula itself supplies the judex with no legal principles to guide him in arriving at a judgment. In the absence of such principles, all the legal rules which, in this particular concrete case, govern the relation between the fact—as the condition—and the

[9] As far (that is to say) as the condemnatio is concerned. The intentio juris civilis itself, however, may have already undergone a modification, and the action may have been thereby converted from a civil law action into a praetorian actio utilis (p. 181). But even in the actio utilis, when it is an actio in jus concepta, the law referred to is the civil law (though in a modified form), so that, in such cases, an unqualified condemnatio always indicates the agreement of the praetor with the civil law to which he makes reference.

§ 40. condemnatio—as the thing conditioned—must be expressly laid before the judex in the form of an exceptio. In a formula in factum concepta the exceptio embodies all the reservations which the meagreness of the intentio entitles the judex to have set out for him by the praetor.

In its material sense—and it is only when coupled with an intentio in jus concepta that we can speak of an exceptio having a material sense—an exceptio signifies a plea which is good by the praetorian law, but bad by the civil law.

Of all the exceptiones the exceptio doli played the most important part in the development of Roman law. It had received the general form: si in ea re nihil dolo malo A^{i}. A^{i}. factum sit neque fiat (Gajus iv. § 119)[10]. The exceptio, as thus worded, required the judge, in the first place, to take account of the dolus of which the plaintiff had been previously guilty, at the time, namely, when he concluded the juristic act. (This is the force of the perfect tense: factum sit.) So far, the exceptio doli was the same as the plea of fraud which we have already discussed (p. 136), a plea by which, as in the exceptio metus, pacti de non petendo, &c., the defendant alleged a single definite fact for the purpose of repelling the plaintiff. Hence the exceptio doli, when used in this manner, is usually called by modern writers the exceptio doli specialis. In the second place, however, the judge was also required, by the form of the exceptio doli, to take account of the dolus of which the plaintiff was now guilty, by the very fact namely of his taking the action. (This is the force of the present tense: fiat.) And such is the dolus of a person who institutes legal proceedings, knowing full well that for some reason or other his suit is inconsistent with good faith, who, in other words, by the very act of commencing the suit, runs deliberately counter to the requirements of bona fides. Such would be the case, if a person were to sue on a transaction to which he had induced the defendant by intimidation, or if he were to take an action notwithstanding an informal agreement to the contrary (pactum de non petendo). In this wise the exceptio doli may sometimes serve the

[10] In this form the exceptio dates at least from the time of Labeo; v. A. Pernice, *Labeo*, vol. ii. p. 113.

purposes of the exceptio metus or the exceptio pacti. But Roman jurisprudence did not stop here. An exceptio doli was declared to be available, not only where the plaintiff in taking legal proceedings was acting maliciously, but also wherever, as it was said, 'ipsa res in se dolum habet' (l. 36 D. de verb. obl. 45, 1), i. e. wherever the raising of the action constituted objectively a breach of good faith. The insertion of the exceptio doli in the formula was considered as empowering the judge to take account of every single circumstance which would render the condemnation of the defendant substantially unjust. Hence modern writers usually call the exceptio doli, when employed in this manner, the exceptio doli generalis—a distinction which was unknown to the Romans, who used the term exceptio doli indiscriminately in the sense both of an exceptio doli generalis and an exceptio doli specialis. In this way the exceptio doli could be employed in lieu of all other special exceptiones, operating as a kind of general reserve clause, which, without specifying the defence, enabled the defendant to set up in judicio any fact which, for any reason whatever, might seem calculated to secure his acquittal. It was this breadth of scope that fitted the exceptio doli for becoming, above all things, the instrument which was used, both in the theory and the practice of Roman law, for effecting such modifications of the material law as equity seemed to require. Thus, the exceptio doli was employed for the purpose of mitigating the harshness of the jus strictum which governed all those transactions where the resulting obligation was strictly and literally interpreted (§ 63). It was employed for the purpose of saving the true sense of a formal promise from the consequences deducible from the mere letter of that promise, and for guarding the underlying economic relation from the strict legal operation of a formal contract, as, for example, when a man had given a promise on the erroneous assumption of an existing liability. Finally it was employed for the purpose of giving effect to counter-claims either by means of a lien ('retentio') —where claim and counter-claim are not ejusdem generis (as e. g. when the defendant is called upon to deliver up some object, but claims compensation for moneys expended on such object)—or by means of a set-off ('compensatio') where claim and counter-claim

§ 40.

§ 40. are ejusdem generis. Thus the exceptio doli came to be the exceptio of all exceptiones, which in the hands of the Roman jurists became a weapon by means of which the jus aequum was enabled to defeat the old jus strictum at every point[11]. Such was the rich and vigorous development the possibilities of which lay hidden in the meagre, briefly-worded clause inserted by the praetor as an exception to the order by which he directed the judex to condemn.

The exceptio by which the condemnatio is qualified may, in its turn, be qualified by a 'replicatio,' or exception in favour of the plaintiff, and the replicatio again may be qualified by a 'duplicatio,' or exception in favour of the defendant, the duplicatio again may be followed by a 'triplicatio,' and so on.

Exceptiones are in their nature either peremptory ('peremtoriae,' 'perpetuae') or dilatory ('dilatoriae'). Peremptory exceptiones—which constitute the majority—are based on facts which absolutely debar the plaintiff from bringing his action. Such exceptiones are exemplified by those mentioned above (p. 198). Dilatory exceptiones are exceptiones which do not absolutely prevent the plaintiff from suing, but only debar him from suing at that particular time (his claim being premature), or in that particular form (e. g. if he sues through an unqualified representative). In pleading an exceptio peremtoria, the defendant demurs to the action itself, in pleading an exceptio dilatoria he merely demurs to the particular manner in which the action is brought[12]. In the classical law, however, the effect of an exceptio is the same in either case. Even where the exceptio is merely dilatory, its effect, if proved, is to discharge the defendant not merely from the action as brought at that particular time or in that particular manner, but to discharge him absolutely. The consumption of the right of action (pp. 163, 176) which resulted from the litis contestatio estopped the plaintiff from ever taking the same action again. The rule by which in modern systems a defendant who is discharged from an action without being acquitted on the merits (the claim having been advanced too soon or in an improper form) remains liable to another action duly and properly

[11] On the above subject v. A. Pernice, *Labeo*, vol. ii. p. 112 ff.

[12] Cp. Schultze, *Privatrecht u. Process*, p. 320.

instituted, is unknown in the classical law of Rome, and was only introduced in the later empire (by the Emperor Zeno) for cases where an action was brought before the claim was due. § 40.

pr. I. de except. (4, 13): Comparatae sunt autem exceptiones defendendorum eorum gratia, cum quibus agitur. Saepe enim accidit, ut licet ipsa persecutio, qua actor experitur, justa sit, tamen iniqua sit adversus eum, cum quo agitur. § 1: Verbi gratia si metu coactus aut dolo inductus . . . stipulanti Titio promisisti, . . . palam est, jure civili te obligatum esse; et actio, qua intenditur, dare te oportere, efficax est: sed iniquum est te condemnari. Ideoque datur tibi exceptio metus causa, aut doli mali, . . . ad impugnandam actionem.

§ 9 eod.: Perpetuae et peremptoriae (exceptiones) sunt, quae semper agentibus obstant et semper rem, de qua agitur, peremunt: qualis est exceptio doli mali, et quod metus causa factum est, et pacti conventi, cum ita convenerit, ne omnino pecunia peteretur. § 10: Temporales atque dilatoriae sunt, quae ad tempus nocent et temporis dilationem tribuunt: qualis est pacti conventi, cum convenerit, ne intra certum tempus ageretur, veluti intra quinquennium; nam finito eo tempore non impeditur actor rem exsequi. . . . . § 11: Praeterea etiam ex persona dilatoriae sunt exceptiones: quales sunt procuratoriae, veluti si per militem aut mulierem agere quis velit.

pr. I. de replicationibus (4, 14): Interdum evenit, ut exceptio, quae prima facie justa videatur, inique noceat. Quod cum accidit, alia allegatione opus est adjuvandi actoris gratia, quae replicatio vocatur, quia per eam replicatur atque resolvitur vis exceptionis. Veluti cum pactus est aliquis cum debitore suo, ne ab eo pecuniam petat, deinde postea in contrarium pacti sunt, id est, ut petere creditori liceat. Si agat creditor, et excipiat debitor, ut ita demum condemnetur: si non convenerit, ne eam pecuniam creditor petat,—nocet ei exceptio, convenit enim ita: namque nihilominus hoc verum manet, licet postea in contrarium pacti sunt; sed quia iniquum est creditorem excludi, replicatio ei dabitur ex posteriore pacto convento.

§ 41. *Actio Perpetua and Actio Temporalis. Tempus Utile.*

§ 41. THERE were a number of actiones honorariae which the magistrate only granted within a prescribed period. The praetor would thus more especially decline to grant any penal praetorian action after the lapse of an 'annus utilis,' i. e. any action where the claim to a penalty was founded, not on the civil law, but solely on the praetorian edict. Actions which had to be brought within a prescribed period of limitation are known as 'actiones temporales.' Such a limitation of the right of action implied at the same time a limitation of the right itself, because in all actiones honorariae the plaintiff's legal title rested solely on the promise to grant an action which the praetor announced in his edict (judicium dabo). If the praetor expressly limited his promise to give an action to one year (intra annum judicium dabo), he thereby imposed the same limitation on the plaintiff's right. The expiry of the period extinguished the actio temporalis, and, with it, the right (say, to recover a penalty).

On the other hand, limitations of actions were on principle unknown to the civil law. Actiones civiles, as well as those actiones honorariae which the praetor had not limited within any definite period, were called 'actiones perpetuae.' It was only in quite exceptional cases that in the civil law actions were barred after a certain time [1].

The Emperors Honorius and Theodosius, however, moved by obvious considerations of convenience, enacted in 424 A. D. that all actions should be barred within a certain period. This period was fixed at thirty years in ordinary, at forty in some exceptional cases. If the plaintiff brings an action after the lapse of this period, he may be met with the plea of limitation (praescriptio temporis).

The former rules as to limitations of actions remained in force.

[1] Thus the action de statu defuncti and the querela inofficiosi testamenti (§ 100) had to be brought in five years.

Thus actiones perpetuae are henceforth actions which are barred within thirty or forty years; actiones temporales are actions which are barred within shorter periods. § 41.

A civil law right is founded, not on any promise to grant an action, but simply on the positive law, on the strength of which the magistrate grants the action. Here the legal right begets the legal remedy. Thus though the limitation of civil law actions which Theodosius II introduced operated to bar the action, it did not operate to bar the right itself.

It was in this sense that the later Roman law took the limitation of actions, even as applied to actiones temporales, and it was in the same sense that a uniform system of limitations of actions was developed in the law of the Corpus juris which has been received in Germany—a system in which the periods of limitation vary in length and operate, in all cases, to extinguish, not the right, but only the remedy.

The year fixed by the praetor for cases falling under his rules of limitation was the so-called 'annus utilis,' i. e. a year in which only those days were counted on which legal proceedings could actually be commenced, in other words, those days on which the courts sat, and on which the intended defendant was known and could be actually sued, &c. The term 'tempus utile' is thus explained. Tempus utile means time in the judicial sense, in the sense namely in which only those days are counted which are open to judicial acts, i. e. in the classical period, to acts performed in the presence of the praetor[2]. The opposite of tempus utile is 'tempus continuum,' i. e. time in which, on principle, every day is counted. In the above-mentioned limitations of actions to thirty (or forty)

[2] Tempus utile occurs, in virtue of a rule of law, only where judicial acts (the commencement of an action, an application for bonorum possessio, § 97) come into question. In applying for bonorum possessio the petitioner invokes the aid of the praetor in his judicial capacity, though it was the invariable rule, as early as the classical period, that such application could be addressed to the praetor anywhere (de plano) without any formal sitting of the court. In calculating the period in which application for bonorum possessio had to be made, it was consequently the rule (in the absence of other obstacles of a special kind) to count not only court days but all days, commencing with the day on which the fact of the inheritance having fallen in became known to the applicant.

§ 41. years, time is counted as 'continuum,' in the sense we have just defined.

L. 35 pr. D. de O. et A. (44, 7) (PAULUS): In honorariis actionibus sic esse definiendum Cassius ait: ut, quae rei persecutionem habeant, hae etiam post annum darentur; ceterae intra annum.

L. 1 D. de div. temp. praescr. (44, 3) (ULPIAN.): Quia tractatus de utilibus diebus frequens est, videamus, quid sit experiundi potestatem habere. Et quidem inprimis exigendum est, ut sit facultas agendi: neque sufficit reo experiundi secum facere potestatem, vel habere eum, qui se idonee defendat, nisi actor quoque nulla idonea causa impediatur experiri. Proinde sive apud hostes sit, sive reipublicae causa absit, sive in vinculis sit, aut si tempestate in loco aliquo vel in regione detineatur, ut neque experiri neque mandare possit, experiundi potestatem non habet. Plane is, qui valetudine impeditur, ut mandare possit, in ea causa est, ut experiundi habeat potestatem. Illud utique neminem fugit, experiundi potestatem non habere eum, qui praetoris copiam non habuit; proinde hi dies cedunt, quibus jus praetor reddit.

§ 42. *The Effect of an Action at Law.*

§ 42. In every lawsuit there are two principal acts: firstly, the 'litis contestatio,' the formulating of the legal issue (pp. 149, 174, 175); secondly, the 'judgment,' the decision of the legal issue.

I. Litis Contestatio.

The effect peculiar to the litis contestatio is that it results in the pendency of the cause. That is to say, once the issue has been formulated, the same cause cannot be brought to trial a second time, but must be carried to a final decision on the basis of the issue thus formulated in this particular suit. The litis contestatio marks the decisive exercise by the plaintiff of his right of action. Hence it follows, firstly, that the period of limitation of the right of action is not interrupted till the litis contestatio has taken place; secondly, that the litis contestatio consumes the right of action. The action cannot be brought over again (bis de eadem re ne sit actio). Any

attempt to obtain a judicial re-hearing of the same question (eadem quaestio) would be met by the exceptio rei judicatae vel in judicium deductae[1]. Thirdly, it follows that the litis contestatio is the basis of the judgment. The judgment refers back to the moment of the litis contestatio. The plaintiff must have possessed the right he claims at the moment of the litis contestatio. On the other hand, if the plaintiff is successful, the judgment is to place him retrospectively in the same position as though judgment had been given in his favour at once at the moment of the litis contestatio. This is why the judgment directs the restoration of mesne profits, the payment of damages, and so forth. § 42.

It was this peculiar effect of litis contestatio that suggested to the Romans a comparison between it and the so-called 'novatio' or transformation of a liability (inf. § 67 II). Once the issue has been joined, it is no longer the performance of the act originally due that the plaintiff can claim from the defendant by means of his action—for to allow that would be to allow the repetition of the same action—but merely the continuation of the proceedings that have once been commenced: ante litem contestatam dare reum oportere, post litem contestatam *condemnari* oportere (Gajus III § 180). In consequence, moreover, of the principle of a money condemnatio (p. 189) the original claim of the plaintiff is, in the classical law, transformed into a money claim. Finally, litis contestatio has the effect of converting a claim which, in itself, is not transmissible to the heir (e. g. the actio injuriarum) into a transmissible one. The pendency of the cause, which is the result of the litis contestatio, has therefore this effect in regard to legal procedure that it consumes and, at the same time, resuscitates the right which the plaintiff is seeking to enforce.

II. Judgment.

The peculiar effect of a judgment lies in its legal force. When no

[1] Cp. p. 175, note 2. The so-called negative function of the exceptio rei judicatae—its function, namely, to give effect to the consuming power of an action at law—is its principal function. But, as is observed in the text under II, the same exceptio *may* also be used—and this is called the positive function of the exceptio rei judicatae—for the purpose of giving effect to the contents of the judgment.

§ 42. longer subject to a revision on appeal, it operates like a statutory rule for this individual case[2]. A defendant, by pleading a previous judgment, is able not merely to frustrate the repetition of the same action, but also—and this is called the 'positive' function of the exceptio rei judicatae—to rebut any subsequent claim directly conflicting with the decision contained in the judgment. If the judgment condemns the defendant to pay, or if the defendant makes a formal confessio in jure (sup. p. 30), such judgment, or confessio in jure—provided the latter is followed, where necessary, by a litis aestimatio (cp. l. 6 § 2 D. 42, 2)—entitles the plaintiff to a so-called actio judicati, which results in execution, i. e. the compulsory enforcement of the plaintiff's right.

III. Execution.

In the ancient law every execution was on principle personal (manus injectio, sup. p. 157), and resulted in the bondage of the debtor and a right in the creditor to sell his debtor (trans Tiberim), or to kill him (p. 27). The creditor's right to sell or kill his debtor was abolished by the lex Poetelia (313 B. C.). Nevertheless bondage for debt (operating, however, as a matter of fact, only in the form of imprisonment for debt) continued to be the principal civil law method of execution. When the person of the debtor, whom execution placed in the position of a slave in regard to his creditor, fell under the power of the creditor, the same fate befell his whole estate and probably also his whole family, i. e. the aggregate of those who were subject to his power. Thus every personal execution necessarily—though only indirectly—involved an execution against the debtor's property, because it went, in all cases, against the debtor's entire person and estate, quite regardless of the actual amount due. In executing his debt, he was merely enforcing that self-pledge which was of the essence of every contract of debt of the ancient type (pp. 26. 38). But the idea underlying such self-pledges was that they constituted a conventional penalty: the debtor voluntarily consented to surrender his person and property to the creditor in case he failed to redeem his obligation. Thus the

[2] Cp. Degenkolb, *Einlassungszwang und Urteilsnorm* (1877), p. 80 ff.; O. Bülow, *Gesetz u. Richteramt* (1885).

aim of execution in the old times was not, as it is now-a-days, § 42.
primarily to satisfy the creditor, but rather to punish the debtor by placing under arrest what he (the debtor) himself had pledged for the debt, to wit, his own entire person with everything appertaining to it.

The praetor was the first to grant direct execution against the property of the debtor. This was the so-called 'missio in bona,' by which a creditor was empowered to take possession of the entire estate of the debtor. A magister, elected by the creditors to manage the estate, sold the whole property *en bloc* (venditio bonorum). In consideration of his acquiring the assets, the purchaser of the estate (bonorum emtor) paid the creditors certain percentages on their claims. The execution was therefore uniformly directed against the entire estate of the execution-debtor, and thus necessarily entailed each time the participation of all the other creditors. Both in this circumstance and in the infamy which attached to the debtor in consequence of the missio in bona, we can trace the associations of the old personal execution, the debtor being regarded as having pledged to his creditor not only his property, but also his honour.

Thus the creditors had the option to proceed either by personal execution, according to the civil law, or by real execution, according to the praetorian law. In consequence of a lex Julia (probably not promulgated till Augustus) the debtor was enabled to exclude this option of the creditors by making a voluntary assignment of his property (cessio bonorum), in other words, by voluntarily bringing about an execution against his entire estate[3]. In such cases the creditors had to rest satisfied with real execution of the praetorian type, while on the other hand the debtor escaped infamy, and acquired the 'beneficium competentiae,' i. e. the right, on execution, to retain so much of his property as was necessary for his bare subsistence (ne egeat), he being only condemned 'in quantum facere potest.'

In addition to this general execution against the debtor's estate, which the plaintiff could bring about by an actio judicati, the

[3] Cessio bonorum would correspond to a debtor's petition initiating bankruptcy proceedings.

§ 42. praetor also developed a special execution, under which portions of the debtor's property were seized by way of pledge (the so-called 'pignus in causa judicati captum')—a procedure which was resorted to in certain cases on the postulatio of the plaintiff according as the praetor, acting extra ordinem, judged fit. If the magistrate had decided, in a proceeding extra ordinem (§ 43), that the defendant was bound to restore or deliver up some definite object, a compulsory process which aimed directly at the surrender of this particular object was similarly available, the defaulting debtor being threatened with a pecuniary mulct or, if necessary, with compulsion manu militari. In the later empire the extraordinary procedure became the ordinary form of procedure, and consequently execution of this direct and special kind became the form of execution which was, on principle, applied in all ordinary cases (§ 44). Since that time, execution in civil proceedings became what it is now, a procedure the sole aim of which is the satisfaction of the person entitled.

§ 43. *The Procedure Extra Ordinem. Interdicta. In Integrum Restitutio.*

§ 43. I. The Procedure extra ordinem.

The procedure extra ordinem (scil. judiciorum privatorum)[1] is the procedure in which no judex is appointed, in which there is, therefore, neither litis contestatio (sup. p. 149) nor judgment (sententia, sup. p. 151) in the technical sense of the term. The entire proceedings are conducted before the magistrate in jure who, after investigating the matter in person ('causae cognitio'), pronounces the decision himself (decretum, interdictum). The procedure extra ordinem—a procedure not per formulam, but per cognitionem—is that form of procedure where the magistrate has occasion to give free play to his official power (imperium), and signifies formally

[1] Procedure extra ordinem means literally a procedure 'out of the (regular) order.' Matters tried extra ordinem were not tied to the time appointed for the provincial assizes (the time of the conventus, the rerum actus), nor again to the order in which ordinary causes had to be entered for hearing (the 'ordo judiciorum'). Cp. Hartmann-Ubbelohde (sup. p. 148, note 1), p. 418 ff.

an administrative procedure as opposed to the regular judicial procedure with its concomitant appointment of a judex. In the ordinary procedure the coercive power of the magistrate is, on principle, put out of sight, and the whole matter ends with the verdict of a sworn judge, the force of which is merely to declare the right of the plaintiff in the form of a liquidated money claim, so that, if the plaintiff wishes to bring about an execution, he must proceed to a second action, the actio judicati. On the other hand, the whole machinery of the extraordinary procedure is calculated from the very outset to exhibit the coercive power of the magistrate (the imperium), and to ensure the enforcement of the magisterial will by multae dictio, pignoris capio, missio in possessionem, the physical interference of the magistrate's subordinate officers (manus militaris), and other means. In the ordinary procedure it is the power of the law, in the extraordinary procedure it is the sovereign power of the magistrate to which effect and expression are given[2]. § 43.

The decision of the magistrate in the procedure extra ordinem is called, as we have already observed, 'decretum' or 'interdictum.' The interdict procedure is therefore originally identical with the administrative procedure, and the interdict with the administrative decision of the magistrate.

Among the matters which the praetor was in the habit of settling by administrative means (i. e. by his interdict) we may instance the following: questions concerning public property, such as public roads, rivers, &c.; questions concerning property consecrated to the gods (res sacrae), such as temples, altars, &c.; questions concerning burial grounds (res religiosae); disputes between neighbours; claims for maintenance; claims for the restitution of children or members of a household who were wrongfully withheld; disputes in building matters; disputes between landlords and outgoing tenants, and so forth,—all matters, in short, where the interests of public order were predominant. It was for this reason also that disputes concerning possession were similarly dealt with: disputes, that is to say, not concerning the right to possess, but the actual possession itself, the

[2] Cp. A. Pernice, *ZS. d. Sav. St.*, vol. v. p. 29 ff.

§ 43. disturbance or withholding of possession. It was incompatible with the public interests that persons actually in possession should be disturbed or ousted by sheer physical force. The praetor, therefore, interfered by administrative means (extra ordinem) and decided such disputes by his interdict.

II. The Interdict Procedure proper.

The decision of the magistrate acting extra ordinem soon ceased, in many cases, to constitute any real decision of the matter in dispute. It was often impossible for the praetor to investigate the actual facts of a case. He therefore contented himself with a statement of the principle on which the case should be settled; in other words, with a pronouncement, addressed to the parties, of the administrative rule which he (the praetor) recognized.

To take an instance. A has granted B permissive possession ('precario') of some object, say, a piece of land, i. e. he has granted B possession on terms that B shall redeliver on demand. If B (the 'precario habens'), after demand made, refused to restore the property, A (the 'precario dans') could apply to the praetor in his administrative capacity as the guardian of public order, and claim that he (the praetor), acting extra ordinem, should, by his interdict, provisionally re-establish A's previous possession without prejudice to any question of law involved in the dispute, as to who was owner, and so on. It is probable that originally the praetor enquired into the facts of the case himself and pronounced his decision accordingly: *Whereas* you, B, have received such and such a thing precario from A (the plaintiff), you must restore it to A. But it had gradually become impossible for the praetor each time actually to determine the facts of the case himself. Hence the material difference in the nature of his decision at a later time: *Whatever* you, B, have received precario from A (the plaintiff), you must restore to A (quod precario ab illo habes aut dolo malo fecisti ut desineres habere, qua de re agitur, id illi restituas; cp. l. 2 pr. D. de precario 43, 26). A decision of that kind may be pronounced by the praetor at once without any enquiry; nay, he may even formulate and publish it in advance in his album. The praetor's decision, therefore, which was formerly unconditional, is now merely conditional,

and the interdict of the old type has become simply an abstract rule which does not contain any decision of the particular case in question, but merely enunciates the general principle on which it ought to be decided and by which the parties must therefore be guided. The pronouncement which the praetor addresses to the parties is not a judgment, but a *direction*. § 43.

Such a direction published, at the instance of a party, by the praetor in his administrative capacity, for the express purpose that the parties concerned shall abide by it, is known as an interdictum, in the narrower and technical sense of the term. Interdict procedure, therefore, now means that particular kind of extraordinary procedure which results in the pronouncement by the praetor, not of a decision, but of a direction [3].

The parties, however, are naturally anxious to have their dispute decided. For this purpose the interdict procedure will have to be followed up by further proceedings. As a rule the parties proceed by sponsio and restipulatio (cp. p. 176). That is to say, they promise one another mutually to pay a penal sum in case, on the one hand, they have acted, or shall act, in contravention of the direction expressly addressed to them by the praetor (i. e. the interdict), and in case, on the other hand, the adversary has been challenged to make sponsio without just cause. The sponsio and restipulatio thus give rise to an action which is carried on under the ordinary civil procedure. The judgment in this action constitutes, at the same time, the judgment in the interdict proceedings, so that, when judgment has been given with regard to the penal wager, the winner is entitled not only to recover the penalty, but also to have the claim which he put forward in the interdict proceedings satisfied by means of an arbitrium. Sometimes, however, an action is taken at once without any sponsio and restipulatio, the plaintiff, by formula arbitraria, demanding satisfaction of his claim (to a restitution or

[3] The direction may require the restoration (interdicta restitutoria), or merely the production of some object, e. g. a will (interdicta exhibitoria), or again it may require an abstention (interdicta prohibitoria). Prohibitory interdicts have recently been dealt with by Pfersche (*Die Interdicte des römischen Civilprocesses*, 1888), who has pointed out that, like the other interdicts, they are conditional decisions and are therefore, on principle, the same in kind as the other interdicts.

§ 43. production) on the basis of the interdict itself. It is only where the adversary is not called upon to do any positive act (restituere or exhibere), but solely to abstain from doing something (e.g. from disturbing plaintiff's possession), where therefore nothing but a penalty can be claimed for the violation of the order to abstain—it is in such cases alone that the procedure cum sponsione (and, consequently, cum poena) is, of course, the only available method.

Thus the interdict procedure now only serves the purpose of introducing the ordinary procedure with a judicium. It means a procedure in which the decision is based, not on a rule of law, but on an administrative rule laid down by the praetor, a procedure, therefore, which requires that, in each separate case, the administrative rule in question (in other words, the interdict, in the formal sense of the term) shall be expressly made known to the parties concerned. In reality, however, the interdict procedure in this its later form is nothing more than an actio, differing from an ordinary action only in regard to the conduct of the proceedings in jure, the first step being the publication of the direction to the parties, and so forth. By the time of Justinian all peculiarities of the interdict procedure have fallen into desuetude. The interdict has ceased to be a direction published, in each separate instance, for the guidance of the parties, and has come to be regarded simply as a rule of law of general validity giving rise to the actio ex interdicto—an action commenced in the ordinary way, but conducted in accordance with the procedure extra ordinem (§ 44).

Gaj. Inst. IV § 139: Certis igitur ex causis praetor aut proconsul principaliter auctoritatem suam finiendis controversiis interponit; quod tum maxime facit, cum de possessione aut quasi possessione inter aliquos contenditur; et in summa aut jubet aliquid fieri, aut fieri prohibet; formulae autem et verborum conceptiones, quibus in ea re utitur, interdicta vocantur vel accuratius interdicta decretaque.

L. 2 pr. D. de precario (43, 26): Ait Praetor: Quod precario ab illo habes, aut dolo malo fecisti, ut desineres habere, qua de re agitur, id illi restituas.

L. 1 pr. D. uti possid. (43, 17): Ait Praetor: Uti eas aedes,

§ 43.

QUIBUS DE AGITUR, NEC VI, NEC CLAM, NEC PRECARIO ALTER AB ALTERO POSSIDETIS: QUOMINUS ITA POSSIDEATIS, VIM FIERI VETO.

L. 1 pr. D. de liberis exhib. (43, 30): Ait Praetor: QUI QUAEVE IN POTESTATE LUCII TITII EST, SI IS EAVE APUD TE EST, DOLOVE MALO TUO FACTUM EST, QUOMINUS APUD TE ESSET, ITA EUM EAMVE EXHIBEAS.

III. In Integrum Restitutio.

Where a person has suffered a legal prejudice by the operation of the law, and the magistrate, in the exercise of his imperium, rescinds such prejudice by re-establishing the original legal position, in other words, by replacing the person injured in his previous condition,—such rescission is called In Integrum Restitutio. Thus, whereas an action supplies a remedy against a wrong, in integrum restitutio supplies a remedy against the law itself, a remedy which is rendered necessary by the inability of the law to provide prospectively for all possible concrete circumstances. To a certain extent the law must always generalize, i. e. it must always, in some measure, leave the concrete circumstances out of sight. The law, for example, declares that if I have made an agreement in a form which is legally binding, I must abide by such agreement and cannot withdraw. True, the law itself may create exceptions to such a rule by providing that certain concrete facts, which would render the application of the rule inequitable, shall be taken into consideration. Thus, the Roman civil law (the lex Plaetoria, about 186 B.C.) declares that, in certain exceptional cases, an agreement, though validly concluded, is nevertheless not binding, if namely such agreement has been the means of fraudulently overreaching (circumscribere) a person of less than 25 years. Or again, the praetor, generalizing the exception created by the lex Plaetoria, announces in his edict that he will relieve any person (be he minor or major XXV annis), who has been fraudulently overreached, from the legal consequences of his juristic act (sup. p. 136). It is in this manner that a 'jus singulare,' a law which is an exception to the ordinary law (sup. p. 18), comes into existence, concrete facts being taken into account and the law, so to speak, rectifying itself.

§ 43. But in order to avoid all injustice, it is not sufficient that the law should in this manner rectify itself. It is not enough for legislation, or quasi-legislation, like the praetorian edict, to modify one general rule by another of an equally abstract character. It is thus that occasion arises for the praetor to use his imperium with a view to rectifying the law in individual concrete cases by virtue of his absolute sovereign power. This is what we mean by in integrum restitutio. The operation of the law has resulted in a legal prejudice, and the praetor, having personally enquired into the matter (causae cognitio), and acting on his own magisterial discretion, which enables him to consider all the concrete facts of the case, issues his decree cancelling this prejudice. If the prejudice consists in the loss of a right of action (e. g. by limitation), the restitution proceedings end with the granting of the actio, in other words, of the formula. The restitution thus granted by the praetor in jure is then followed by a judicium, the so-called 'judicium rescissorium,' i. e. the trial and decision of the actio which has thus been restored (actio restitutoria or rescissoria). The restitution proceedings themselves (the 'judicium rescindens') are invariably conducted and concluded by the praetor himself.

There were two classes of cases in which restitution was granted, firstly, the restitutio minorum; secondly, the restitutio majorum.

(1) Restitutio Minorum (XXV annis).

The above-mentioned lex Plaetoria was the first to fix the limit of age at 25 years, and to clothe this limit with certain effects. Hence the description of majority as 'legitima' aetas. The lex Plaetoria itself gave the minor circumscriptus relief from any juristic act which he had concluded under the influence of fraud[4]. The praetor, then, through his edict on dolus, extended the same protection against fraud to persons of full age (p. 136). But while thus practically doing away with the importance of the limit of twenty-five years, the praetorian edict, in a different sense, re-established it. The praetor namely proceeded to give minors a general promise of relief which

[4] It would seem that the lex Plaetoria (sometimes called the lex Laetoria) gave a private action ex delicto for fraud practised on a minor xxv annis. Cp. Pfaff and Hofmann, *Fragmentum de formula Fabiana* (Vienna, 1888), p. 38 ff.; also Krüger, *ZS. de Sav. St.*, vol. ix. p. 149, note 5.

was not confined to cases of fraud. He announced in his edict § 43.
that he was prepared to examine any transaction concluded with a minor with a view to ascertaining whether it should be upheld or not. It was thus not only in cases of fraud, but in any case whatever where the practical result of the transaction was prejudicial to him, that a minor could hope to have it cancelled by the help of the praetor (in integrum restitutio). The upshot of this practice was the development of the general rule that wherever a minor had, in any manner whatever, whether by a juristic act or otherwise, suffered a prejudice in consequence of his minority, he was entitled to in integrum restitutio.

L. 1 § 1 D. de minor. (4, 4): Praetor edicit: QUOD CUM MINORE QUAM VIGINTI QUINQUE ANNIS NATU GESTUM ESSE DICETUR, UTI QUAEQUE RES ERIT, ANIMADVERTAM.

(2) Restitutio Majorum (XXV annis).

There are circumstances in which a person of full age is in equity equally entitled to in integrum restitutio. This is especially the case when he suffers a prejudice through absence from home (restitutio propter absentiam). In consequence of his absence he may, for example, have lost a right of action by limitation, or some property through usucapio on the part of a third person. The first case dealt with from this point of view was the case of captivity in war. Other cases of absence (e. g. rei publicae causa) were then treated in the same manner, and finally relief was afforded, on the same principle, in all cases where a person was, in any way, reasonably prevented from protecting his right[5]. Besides absentia, there are other grounds which entitle a person of age to in integrum restitutio, to wit: intimidation (metus), fraud (dolus), and error.

Thus in the case of minors the promise to grant restitution is a general one; the minor has only to appeal to his minority and to prove that he has been prejudiced in consequence of this minority. A person of full age, however, can only hope to obtain restitution in individual cases (absentia, metus, dolus, error), and he will have to

[5] For the edict on the in integrum restitutio propter absentiam, v. sup. p. 58.

§ 43. prove each time, in the concrete, that in his particular case the necessary conditions are forthcoming.

§ 44. *The Procedure of the Later Empire.*

§ 44. The ancient division of ordinary actions into jus and judicium had already lost part of its original significance in consequence of the development of the formulary procedure, since the effect of the formula had been to convert the judex into an organ and instrument not only of the civil, but also of the praetor-made law (p. 178). The judicium was now regulated by the same authority that controlled the proceedings in jure. On the other hand, the final consolidation of the edict by Hadrian (sup. p. 56) deprived the praetor and the praesides provinciarum (who exercised the ordinary jurisdiction in the provinces) of the jus edicendi in the old sense of the term. The praetor and the praeses were henceforth bound by the existing civil law and by the edict (as fixed by the will of the emperor) in the same way as the judex. The publication of the edict by the praetor had sunk to a mere form. The praetor was, in fact, stripped of his ancient imperium. Like the judex he became a mere instrument for applying the law, and his duties became more and more ministerial in proportion as, on the one hand, scientific jurisprudence developed and defined the contents of the existing law and, on the other hand, the imperial power, superseding all other agencies, appropriated to itself the function of developing the law [1].

Thus the judex gradually became an official whose duty it was to assist the praetor, and, in the same way, the praetor became in reality an official whose duty it was to assist the emperor. From the reign of Diocletian the administration of the law in Rome was also formally transferred from the praetor to an imperial functionary, the praefectus urbi. In the provinces the old distinction between senatorial and imperial provinces was abolished, and the praesides provinciarum were at the same time turned into imperial governors. Over them

[1] Schultze, *Privatrecht u. Process*, p. 533 ff.

stood the praefecti praetorio with their substitutes, all of whom likewise exercised jurisdiction in the name of the emperor. The republican forms and magistracies were thus finally displaced by the monarchy with its system of dependent officials. The foundations of the old procedure had disappeared. The new procedure which was now gradually taking shape was modelled on the forms in which, till then, proceedings before the emperor had been conducted. § 44.

Ever since the establishment of the principatus it had been allowable to bring legal matters of any kind from any part of the empire before the emperor for the purpose of obtaining his decision thereon. But whenever the emperor took upon himself to decide a case, he did so without appointing a judex (privatus), and determined the matter either in person or through a delegate nominated by him for the purpose (e. g. the praetor urbanus or a praeses provinciae)[2]. The necessity of instituting a judicium (a judex privatus) imposed a certain restriction on the discretion of the magistrate which did not exist in the case of the imperial power. The form of procedure which the emperor adopted was then imitated by the imperial officials. We observe that, towards the end of the third century, the praesides provinciarum were in the habit of proceeding extra ordinem in civil actions, i. e. they were in the habit of either giving judgment themselves or of delegating the whole cause to a

[2] Thus Octavian delegated every year the 'appellationes' of litigant parties in the capital to the praetor urbanus; cp. Suetonius Octav. c. 33, and on the same point J. Merkel, *Abhandlungen* (sup. p. 151, note 5), Heft ii. p. 46 ff.—In delegating the hearing of a cause the emperor often addresses a rescript—hence the name 'action by rescript'—to the judex delegatus, containing a provisional decision of the legal question (si preces veritate nitantur). The application for the rescript (supplicatio, preces, libellus principi datus) produces the same effects as the litis contestatio. The rescript may thus be regarded as a kind of counterpart to the formula in the extraordinary procedure. But whereas it is the essence of the formula primarily to formulate the legal issue, it is the essence of the rescript primarily to decide it. And further the judgment of the judex delegatus, acting on the imperial rescript, is the judgment of the emperor himself; the judgment of the judex acting on the praetorian formula is the judgment, not of the praetor, but of the appointed judex, however much the substance of his judgment may be determined by the praetor through the medium of his formula. An action by rescript therefore is an extraordinary action, and a judex delegatus, as such, is not a private individual, but the official representative of the imperial sovereignty.—A plea on the part of the defendant that the plaintiff, in applying for the rescript, has suppressed certain facts, is called a 'praescriptio subreptionis'; a plea that the plaintiff, in applying for the rescript, has alleged certain facts which are not true, is called a 'praescriptio obreptionis.'

§ 44. deputy judge, a 'judex pedaneus.' This deputy judge (who is also called 'judex datus' or 'judex delegatus') is now in form, as well as in substance, an *official* who acts in lieu of the magistrate; he is not merely entrusted, like the old judex privatus, with the conduct of the proceedings in judicio, but is deputed—and this is the reason why no formula is used—to hear and determine the whole cause, including the proceedings in jure. Like the proceedings before the praeses himself, the proceedings before this subordinate judge are extra ordinem. Diocletian, while sanctioning this form of procedure, insisted that, as a matter of principle, the provincial governors should decide disputes themselves, and should not depute the hearing of any cause to a judex pedaneus, unless they were actually prevented from trying it themselves[3]. A law of the Emperor Julian A. D. 362 (c. 5 C. de ped. jud. 3, 3) positively restricted the governors' powers of delegation to 'negotia humiliora.' It is obvious that the success which attended these proceedings on the part of the imperial officials was due, not to mere arbitrary power, but to a change which had taken place in the legal views of the people in general. The fact that every official was bound by the existing law, because he did not possess the old imperium, had stripped the original view, according to which a magisterial decision was not a judgment in the legal sense of the term, of all foundation, and had definitely deprived the old division into jus and judicium of the meaning which originally attached to it. The difference between a decretum and a sententia had ceased to exist. The decision of the magistrate (i. e. of the official) was now, like the decision of the judex privatus, a verdict, a sententia, and owed its force, not to the imperium, but to the law. The formula was granted in the classical procedure on the petition of the plaintiff, who applied to the magistrate for some particular formula (impetrare actionem). But with the development of the new point of view, the necessity of applying for a formula, and consequently for a judicium, ceased to present

[3] This is the meaning of l. 2 C. de pedaneis judic., 3, 3. Cp. A. Pernice in the *Berliner Festgaben* (sup. p. 63, note 4), p. 77, and in the *ZS. d. Sav. St.*, vol. vii. p. 103 ff; Mommsen, *Röm. Staatsrecht*, vol. ii. part 2 (2nd ed.), p. 938.

itself. The tendencies of officialism were thus furthered by the practice of the parties themselves. The impetratio actionis was dispensed with, and the entire proceedings were conducted before the functionary to whom application had been made—a practice which offered this additional advantage to the plaintiff that it avoided the dangers involved in every application for a definite formula, the danger, namely, of applying for the wrong formula, or of falling into some error in fixing the wording of the formula. It was not however till the fourth and fifth centuries respectively that this whole course of development was definitely brought to a close by means of two imperial constitutiones, one of which forbade the use of the 'hair-splitting juris formulae' (l. 1 C. de formulis sublatis 2, 57; A. D. 342), while the other, following up the first, provided that the defendant in an action should not be allowed to plead in defence that the plaintiff had failed to apply for an actio, i. e. for a formula (l. 2 C. eod.; A. D. 428.) The abolition of the formulary procedure was thus brought about by a process as gradual and as spontaneously progressive as that which had once resulted in its growth and adoption. § 44.

The upshot of this course of development was that, in point of form, every action became, in its entirety, a proceeding in jure, conducted before the magistrate or his deputy, and that, in point of form, the extraordinary procedure became the ordinary procedure. In its material aspect, however, the new procedure was nothing more than a machinery for applying the law, and retained therefore, to this extent, the features of the ancient judicium.

The formula ceased to be granted, and the place of the litis contestatio was taken by the act by which both parties submitted their case to the magistrate (l. un. C. de lit. cont. 3, 9). The disappearance of the formula removed the necessity for a money condemnation and, with it, that narrowness of character which, as we have seen (sup. p. 189 ff.), continued to attach even to the classical procedure. The magistrate could now decree specific satisfaction, and since his judgment was the judgment of an official, his decree could be followed by specific execution supported by the power of the state. The practice of decreeing specific execution led to the development,

§ 44. on a general scale, of that system of special execution by pignoris capio which enabled an individual creditor to obtain satisfaction, without having to resort each time to the circuitous method of first seizing his debtor's entire estate (sup. p. 212). On the other hand, the fact that the judgment was the judgment of an official resulted in the full development of that system of appeals the aim of which was to substitute, in place of the decision of the lower official, the decision of a higher one, and, in the last instance, the decision of the emperor himself as representing the highest court of appeal (p. 151, note 5).

The later procedure is thus characterized by greater freedom and elasticity, more especially in regard to the proceedings on judgment and execution. At the same time we observe a tendency to utilize the practice of appealing to the imperial power for the purpose of establishing a uniform system of jurisdiction throughout the whole vast empire [4].

The disappearance of the formula marked the disappearance of the last formal element of the old type and, with it, the disappearance of the last trace of the ancient magisterial sovereignty. Every judge was now a public officer in the modern sense of the term; every judgment was a judgment in the emperor's name, subservient to, and controlled by, the central authority. In a word, the procedure of the later empire marks the first stage in the development of the modern action-at-law [5].

[4] For further details on the procedure of the later empire v. Bethmann-Hollweg, *Der Civilprocess des gemeinen Rechts in geschichtlicher Entwickelung*, vol. iii. (1866). For some recent contributions on points of detail v. A Pernice, *ZS. d. Sav. St.*, vol. vii. part 2, p. 129 ff.; Kipp, *Die Litisdenuntiation* (1887); Baron, *Abhandlungen aus dem röm. Civilprocess*, vol. iii: *Der Denuntiationsprocess* (1887).

[5] Cp. Schultze, *loc. cit.* p. 562 ff.

CHAPTER II.

The Law of Things.

§ 45. *The Conception of a Thing.*

§ 45. The Romans applied the term 'res' to anything that can form part of a person's property, and divided res, in this sense, into 'res corporales,' or corporeal property (i. e. 'things' in our sense of the term), and 'res incorporales,' or incorporeal property, such as rights of inheritance, jura in re aliena, rights and liabilities under an obligation. With us the term 'thing' is generally only applied in the narrower and technical meaning of res corporales, and a thing, in the legal sense, is a material object which admits of human dominion and has an independent existence as a whole complete in itself. The orbit of the real rights is thus defined. Things must necessarily be the *objects* of private law. There can be no real right over that which is not a thing, for example, a mere fraction of a thing.

pr. I de reb. corp. (2, 2): Quaedam . . . res corporales sunt, quaedam incorporales. § 1: Corporales eae sunt, quae tangi possunt, veluti fundus, homo, vestis, aurum, argentum, et denique aliae res innumerabiles. § 2: Incorporales autem sunt, quae tangi non possunt, qualia sunt ea, quae in jure consistunt: sicut hereditas, ususfructus, obligationes quoquo modo contractae.

§ 46. *The Different Kinds of Things.*

§ 46. I. Certain things are prevented by a rule of law from being the objects of private rights. Such things are called 'res extra commer-

§ 46. cium.' Of res extra commercium we have three classes: res divini juris, res publicae, res omnium communes.

(*a*) Res divini juris include 'res sacrae,' or things dedicated to the gods, such as temples and altars; 'res sanctae,' or things enjoying the special protection of the gods, such as the walls of Rome; 'res religiosae,' or things dedicated to the dii Manes (i. e. burial grounds). Cp. sup. p. 102.

(*b*) The term 'res publicae,' or public property, originally embraced everything that was owned by the populus Romanus (state property). Whatever belonged to the Roman people lay outside the pale of private law (p. 102). It was not till, in the first instance, communities, and then the state had come to be regarded as (private) juristic persons that such portions of the public property as subserved the lucrative and financial purposes of the state or community, were admitted to rank with the res privatae, and were, as such, treated as fit objects of ownership and commercial dealings in accordance with the rules of private law. Thus we find that in Justinian's law, the term res publicae denotes, technically, only such public things as are 'publico usui destinatae,' things, that is to say, which are devoted to the common use of all, which are never, therefore, on principle, the objects of exclusive individual rights after the fashion of private rights. Such things are e. g. public roads, public places, public rivers. Things of this kind continue to be res extra commercium, or things withdrawn from the domain of private law.

(*c*) Res omnium communes are the open air, the water of a natural stream, the sea, and the soil of the sea. Res communes are not, properly speaking, 'things' in the legal sense of the term, inasmuch as the atmosphere of the earth, the ocean, and the flowing water of a natural stream (aqua profluens) are not, as such, susceptible of human dominion

Gaj. Inst. II § 3: Divini juris sunt veluti res sacrae et religiosae. § 4: Sacra sunt, quae diis superis consecratae sunt; religiosae, quae diis Manibus relictae sunt. § 5: Sed sacrum quidem hoc solum existimatur, quod ex auctoritate populi Romani consecratum est, veluti lege de ea re lata aut senatusconsulto facto. § 6: Religiosum vero nostra voluntate facimus, mor-

tuum inferentes in locum nostrum, si modo ejus mortui funus ad nos pertineat. § 8: Sanctae quoque res, velut muri et portae, quodammodo divini juris sunt. § 9: Quod autem divini juris est, id nullius in bonis est. § 46.

§ 1 I. de rer. div. (2, 1): Et quidem naturali jure communia sunt omnium haec: aër et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur: dum tamen a villis et monumentis et aedificiis abstineat. . . . § 2: Flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque. § 3: Est autem litus maris, quatenus hibernus fluctus maximus excurrit. § 4: Riparum quoque usus publicus est juris gentium, sicut ipsius fluminis; itaque navem ad eas appellere, funes ex arboribus ibi natis religare, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare; sed proprietas earum illorum est, quorum praediis haerent: qua de causa arbores quoque in isdem natae eorundem sunt.

II. Res in commercio are all equally capable of being subject to private ownership. Among them the following distinctions are legally of importance:

(*a*) 'Res nullius' are things which, as a matter of fact, belong to nobody, e. g. wild animals in a state of freedom. Ownership in them can be acquired by occupatio (inf. § 51).

(*b*) 'Consumable things' (res, quae usu minuuntur vel consumuntur) are things which are extinguished by use, e. g. food, money. Of such things there can be no usufruct (inf. § 56), because the usufructuary is only allowed to use the thing 'salva rei substantia,' i. e. as long as he keeps its substance intact.

Money is 'consumed' by being spent, or by being mixed with other money in a manner which renders it impossible to determine to whom the separate coins respectively belong. Thus, if I use another person's money to pay a debt or give a loan, the receiver of the money becomes the owner, not however in virtue of the delivery (traditio), but in virtue of the subsequent mixing of the money. (Si nummi mixti essent—scil. with other money belonging to the receiver—ita ut discerni non possent, ejus fieri qui accepit, l. 7 D. de solut. 46, 3). After the mixture the 'pecunia aliena,' as such,

§ 46. has disappeared. It has ceased to exist, as far as the former owner is concerned. It has been, economically speaking, appropriated by the receiver in just the same way as though it were food which had been consumed. But the circumstances attending the consumption may be such as to impose an obligation on the receiver to refund the money he received (§ 70 I a).

(*c*) 'Res fungibiles' (res, quae pondere, numero mensurave constant), are things which in ordinary dealings do not occur individually, but only in certain quantities and qualities. Such things are e. g. money, wine, grain, eggs, apples, cigars, &c., as opposed to e. g. horses, books, pieces of land. Where a person owes res fungibiles, he is not bound, in case of doubt, to supply a fixed species of things which are individually determined, but only a certain quantity and quality of things which are generically determined. For the rule concerning res fungibiles is: tantundem ejusdem generis est idem [1a]. It is an essential of every contract of loan that it can only arise on the transfer of a res fungibilis (inf. § 66). Res fungibiles might therefore be better described as things which can be the objects of a contract of loan.

(*d*) 'Divisible things' are things which can be divided into several things without impairing the value of the whole. In this sense the following are, as a rule, divisible: land, a given quantity of wine, a piece of cloth (as contrasted e. g. with a coat), and so forth. In a partition suit, where the subject-matter is a divisible thing, the judge actually divides it, i.e. he separates it into several things; where it is indivisible, on the other hand, the joint interest must be severed by a different process (v. inf. p. 236).

When a whole is divided into what are called 'ideal' parts, there is no real division of the thing. In all such cases (as e. g. in the case of common ownership) several persons have common rights in the same thing, the rights being divided, but not the thing itself.

[1a] In the transfer of res fungibiles (which 'numero constant'), as e. g. in a sale of grapes, apples, or eggs, the separate things, even when they are not, as a matter of fact, precisely equal to one another, are counted, without distinction, as equal. (This is the essence, legally speaking, of adnumerare). Cp. Karlowa, in Grünhut's *ZS. für Privat- und öffentliches R.*, vol. xvi. (1889), p. 411.

III. Res mancipi and Res nec mancipi. § 46.

The Roman division of things into res mancipi (mancipii) and res nec mancipi (mancipii), i. e. into things which were, and things which were not, capable of mancipatio, was of considerable importance from an historical point of view[1b]. It is for the alienation of res mancipi, and no others, that the mancipatio, or solemn sale of the ancient law (§ 10), with all the peculiar effects incident to it, is available. In them alone, on the one hand, can the alienee acquire the so-called quiritary, or full Roman ownership; with them alone, on the other hand, is the mancipio dans bound by a warranty of authority, rendering him liable to an actio auctoritatis. And, conversely, res mancipi can only be acquired by a solemn juristic act of the civil law, such as mancipatio or its equivalents (inf. § 49), and never by a mere formless juristic act of the jus gentium without any accompanying solemnities. The res mancipi are the privileged things of early Roman law, the things which are regarded as constituting the staple of the farmers', and, at the same time, of the nation's property, whose alienation and acquisition therefore, being a matter of public interest, cannot be effected without publicity and the sanction of the community, the community being represented by the five witnesses or by the magistrate. And this same view of res mancipi being national property necessitates what was perhaps, for the oldest times, the most important fact of all, namely, the inability of aliens to acquire ownership in such things. Every alien (peregrinus), as such, is shut out from the use of the juristic acts of the specifically Roman civil law, including, therefore, mancipatio. Consequently no alien can become owner of a res mancipi, unless indeed he has been granted the privilege of the jus commercii (sup. pp. 40, 116). As for the movable res mancipi, the fact of their being res mancipi operates, practically, to prohibit their removal beyond the confines of the Roman state. And the fact that the 'fundus Italicus' (which was originally, doubtless, only the land actually within Roman territory) is a res mancipi, means that, on principle, no one but a Roman citizen could own landed property in Rome (and afterwards in Italy).

[1b] Mancipium is equivalent to mancipatio (sup. p. 32); res mancipi, therefore, are literally 'mancipatio-things.'

§ 46. Res mancipi, then, are things the alienation of which is hampered with certain restrictions on account of the public interests.

The following are res mancipi: (1) the fundus Italicus (the provincial soil, however, is owned by the Roman people and does not therefore admit of genuine private ownership, cp. § 51 II); (2) rural servitudes, i. e. rights annexed to a landed estate in Italy (§ 56); (3) slaves; (4) four-footed beasts of draught and burden. The list of res mancipi thus comprises the principal appendages, movable and immovable, of an old Italian farm[2].

GAJ. Inst. II § 19: Res nec mancipii ipsa traditione pleno jure alterius fiunt. § 22: Mancipii vero res sunt, quae per mancipationem ad alium transferuntur; unde etiam mancipii res sunt dictae.

ULP. tit. 19 § 1: Omnes res aut mancipii sunt aut nec mancipii. Mancipii res sunt praedia in Italico solo, tam rustica, qualis est fundus, quam urbana, qualis domus; item jura praediorum rusticorum, velut via, iter, actus, aquaeductus; item servi et quadrupedes, quae dorso collove domantur, velut boves, muli, equi, asini. Ceterae res nec mancipii sunt; elefanti et cameli, quamvis collo dorsove domentur, nec mancipii sunt, quoniam bestiarum numero sunt. § 3: Mancipatio propria species alienationis est rerum mancipii.

§ 47. *Real Rights.*

§ 47. Real rights are private rights which confer on the person entitled an immediate control over a thing as against all the world. Every one is bound to respect my right in the thing, such as it is, whether it be ownership or some other right. My right excludes every one from the use and disposition of the thing, who has not, himself, some special right available as against me, for example, as a lessee or a usufructuary.

[2] Jhering thinks it probable (see his *Jahrbücher für Dogmatik*, vol. xxiii. p. 204, note 1) that in the early law, wherever res nec mancipi were concerned, a simple 'meum esse' was possible, without the addition of 'ex jure Quiritium,' and that rights over res nec mancipi were protected, not by means of vindicatio (which presupposed quiritary ownership), but solely by means of actiones furti.

The fullest of all real rights is Ownership. § 47.

Opposed to ownership we have the rights over the things of others (jura in re).

I. Ownership.

§ 48. *The Conception of Ownership.*

Ownership is the right, unlimited in its contents, to exercise § 48. control over a thing. The difference, in point of conception, between ownership and the jura in re aliena is this that ownership, however susceptible of legal limitations (e. g. through rights of others in the same thing), is nevertheless absolutely unlimited, as far as its own contents are concerned. As soon therefore as the legal limitations imposed upon ownership—whether by the rights of others or by rules of public law—disappear, ownership at once, and of its own accord, re-establishes itself as a plenary control.

§ 49. *The Acquisition of Ownership. Historical Introduction.*

The pre-Justinian law on the acquisition of ownership distinguished § 49. between acquisitiones civiles and acquisitiones naturales.

The acquisitiones civiles were the modes of acquisition recognized by the jus civile; in other words, the modes of acquisition peculiar to Roman law. The common elements in all these modes were publicity and solemnity. The solemnity consisted in the use of certain prescribed words and acts; publicity was obtained by the participation, in some form, of the community, whether it was through the medium of five witnesses, representing the five classes of the Roman people, or through the medium of the magistrate. The acquisitiones civiles were as follows:

(1) Mancipatio, or sale, carried out in due legal form in the presence of five witnesses and a libripens (sup. pp. 24, 25), and—closely connected with the mancipatio—the Legatum, or solemn legacy in a mancipatory will (inf. § 99).

§ 49. (2) The magisterial Addictio, or award, pronounced either on the ground of a confession on the part of the defendant in an in jure cessio (i. e. in a fictitious vindicatio made for the purpose of acquiring a title, sup. p. 31), or on the ground of a sale by public auction (e. g. of booty of war; 'venditio sub hasta'), or, again, for purposes of an 'assignatio,' or magisterial grant of ager publicus, or, finally, in the form of an adjudicatio, i. e. a judicial award in a partition suit (inf. § 50 III).

The acquisitiones naturales were the modes of acquisition recognized by the jus gentium. They are devoid of solemnity and publicity, and the legal title, such as it is, is acquired, as a rule, through the medium of possession. The most important forms of natural acquisition were Traditio and Occupatio.

These different modes of acquisition were supplemented by Usucapio, or prescription—itself a form of civil acquisition, because its development was shaped by rules peculiar to Roman law (§ 51 II).

The difference in the modes of acquisition was connected with the difference in the things themselves. The rule was that res mancipi (§ 46 III) could only be acquired in full Roman ownership (dominium ex jure Quiritium) by civil modes of acquisition. According to the civil law no ownership could be acquired in a res mancipi by mere traditio or occupatio. But towards the close of the republic the praetor intervened to reform the civil law in this respect. He declared that, even if a res mancipi had been informally sold (or otherwise alienated) and delivered, he would nevertheless grant the alienee and present possessor an exceptio rei venditae et traditae, if the alienor (whose dominium ex jure Quiritium was not, of course, affected by the transaction according to the formal civil law) brought an action against him to enforce his ownership. The effect of the praetor's intervention was to render the dominium ex jure Quiritium, which on an informal alienation remained in the alienor, worthless as against the alienee. And, conversely, if a person, who had acquired a res mancipi in an informal manner, lost possession of the thing, the civil law would not allow him to sue for its recovery by vindicatio. For having acquired it informally, he was not owner. The praetor

however granted him the so-called actio Publiciana in rem (inf. § 53), § 49. and thereby virtually conferred on him a power to assert his title which was, in all essentials, the same as though he were really the owner of the thing. The praetor, in short, set aside the ownership of the civil law (quiritary ownership), and opposed to it what was practically a different kind of ownership, namely praetorian ownership, which, though it did not make the alienee formal owner, nevertheless operated, by means of the exceptio and actio just mentioned, to make the thing, for all practical purposes, part of his property. Hence property which was held in praetorian ownership was said to be 'in bonis' ('bonitary ownership'). Bonitary ownership may also be acquired in res mancipi by means of natural modes of acquisition[1].

Thus, by means of his edict, the praetor converted the ownership of the old civil law into a bare form, the 'nudum jus Quiritium.' As far as the praetorian law was concerned, the division of things into res mancipi and nec mancipi and, in the same way, the division of modes of acquisition into civil and natural, had ceased to exist.

The civil law, however, retained the old distinctions, and the classical law still rests on the assumption of an antithesis between dominium ex jure Quiritium and in bonis esse. The development of this branch of the law was not brought to a final close till Justinian, who abolished quiritary ownership, and declared that praetorian ownership (which was, in reality, the only ownership in practical existence) should be deemed formally, as it was in fact, the only kind of ownership—the natural modes of acquisition being, of course, alone of importance in regard to such ownership. There was now but one kind of ownership and one system of modes of acquisition, belonging, not to the jus civile, but to the jus gentium. In the law of Justinian concerning the acquisition of ownership the formal antithesis has lost all significance, and the only antithesis of importance is one which is based on the nature of the acquisition itself, the antithesis, namely, between 'derivative' and 'original' modes of acquisition.

[1] The capacity of acquiring ownership in res mancipi was thereby extended to aliens as well.

§ 50. *The Acquisition of Ownership.*

A. Derivative Acquisition.

§ 50. When the goods of the world have been distributed, the normal mode of acquiring ownership will be that I acquire ownership *from another person*. This other person is my 'auctor.' I succeed to his ownership. I only acquire ownership if my auctor was really owner himself. It is in this that the essence of a 'derivative' acquisition of ownership consists.

A derivative acquisition of a right is an acquisition which depends on the existence of the right of a certain other person, to wit, the auctor. Of derivative modes of acquisition there are three in Justinian's law: Traditio, Legatum, Adjudicatio.

I. Traditio.

Traditio is the transfer of possession accompanied by an intention to transfer ownership. In Roman law ownership—whether in movables or immovables—is not acquired by mere consensus (e. g. by a contract of sale or a promise of bounty), but only by actual delivery of possession. The change of possession need not, however, be materially visible. Traditio may be effected by a 'constitutum possessorium,' i. e. by a mere declaration on the part of the transferor that he will hold the thing for the transferee (inf. § 54). And conversely, if a purchaser has already actual control of a thing (having, say, hired it), a mere declaration on the part of the transferor that the purchaser shall hold the thing which is already in his control, as owner, operates as a traditio (the so-called 'brevi manu traditio').

Both in the case of a constitutum possessorium and of a brevi manu traditio a change of ownership is seemingly brought about by a mere declaration of consensus. But the explanation is that this declaration does not merely state that the other shall henceforth be owner, but also, at the same time, effects a change in the physical control, a change, that is to say, in the actual possession of the thing; and it is only through the medium of this change that the

transfer of ownership is accomplished. The hirer, by purchasing the thing he had hired (brevi manu traditio), acquires a different power over the thing from that which he had before. There is no exception to the rule that traditio can never pass ownership, unless there is both a contractual agreement concerning the transfer of ownership, and an execution of this agreement by means of a transfer of the actual possession (viz. the juristic possession, inf. § 54). On the other hand, it is of course also a rule that ownership can never pass by the bare delivery of a thing (e. g. for safe custody, or by way of loan for use), a bare delivery being, legally speaking, no traditio at all. No delivery can be a traditio in the legal sense, unless it is accompanied by an intention to transfer ownership, an intention which is expressed, as a rule, by some juristic act (the so-called 'causa traditionis'), which precedes the traditio; for example, by a contract of sale. § 50.

L. 20 pr. D. de A. R. D. (41, 1) (Ulpian.): Traditio nihil amplius transferre debet vel potest ad eum, qui accipit, quam est apud eum, qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit, nihil transfert.

L. 20 C. de pact. (2, 3) (Diocletian.): Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur.

L. 31 pr. D. de A. R. D. (41, 1) (Paulus): Nunquam nuda traditio transfert dominium, sed ita, si venditio aut aliqua justa causa praecesserit, propter quam traditio sequeretur.

II. Legacy.

A legacy is a derivative mode of acquiring ownership in so far as a testator is able, by his last will, directly to convey his property in ownership to another person in the form of a legacy. The legatee need not actually take possession of the thing, for as soon as his right to the legacy becomes enforceable (dies legati venit), he becomes at once, ipso jure, without any act on the part of the heir, owner of the thing which the testator has directly bequeathed to him in ownership, provided only—and this is why it is a derivative acquisition—that the testator himself was the owner or, at any rate, had power to dispose of the ownership. Inf. § 102.

§ 50. III. Adjudicatio.

Adjudicatio is the award of a judge in a partition suit. The common use of common property—as when several children are co-heirs of their father—does not always suit the interests of the co-owners. A partition may be effected amicably, by agreement. Failing this, a suit for partition becomes necessary. The object of partition proceedings is to convert co-ownership into sole ownership for the purpose of separating the co-owners. This may be done either by physically dividing the thing, i. e. by dividing it into several things, and awarding to each of the previous co-owners sole ownership in one of the new things[1]; or it may be done by awarding to one of the co-owners the whole thing in sole ownership, subject to a duty on his part to pay pecuniary compensation to the other co-owners[2]. In both cases the object is to effect a transfer of ownership, a transfer, namely, of the co-ownership to which the other condomini were entitled in the same thing. This transfer, which converts the person in whose favour it is effected into a sole owner, may, as we said, take place without any judicial proceedings, if the co-owners come to an agreement with one another on the matter. In that case traditio is required, i. e. the co-owners must mutually transfer possession to one another. But if an amicable arrangement fails, the transfer can be brought about by legal proceedings, viz. by a partition suit. In that case it is accomplished by the verdict of the judge, the award or 'adjudicatio,' which operates to change ownership without transferring possession, provided only that the other party to the suit was really a co-owner. The judicial adjudicatio transfers the co-ownership of one litigant to the other. My adversary in the suit whose right of ownership the judge awards to me, is my 'auctor.' Thus, like the preceding modes of acquisition, adjudicatio is derivative, because it depends on the auctor's right of ownership.

It is hardly necessary to warn against confusing an adjudicatio, a judicial award in a partition suit, with the judgment in an action of ownership. Such a judgment acknowledges the plaintiff to be

[1] This can only be done with 'divisible' things, sup. p. 228.

[2] This is what happens in the case of 'indivisible' things.

owner as against the defendant (the non-owner), who had been withholding the property from the plaintiff. The force of a judgment in a rei vindicatio is purely declaratory, declaratory, namely, of a pre-existing right, and its only effect is to debar the defendant—by means of the exceptio rei judicatae (sup. p. 210)—from further disputing the plaintiff's right by legal proceedings. But the force of an adjudicatio in a partition suit is to constitute a right. Its effect is to invest me with a right of ownership which I had not before, viz. the co-ownership of my adversary, the condominus; the result being that I, who was only co-owner before, am now converted into a sole owner. Adjudicatio is thus a mode of *acquiring* ownership, like traditio, &c.; a judgment in a rei vindicatio, on the other hand, is not a mode of acquiring ownership, but only a mode of protecting a right of ownership which has been acquired from a different source. § 50.

§ 7 I. de off. jud. 4, 17: Quod autem istis judiciis (divisoriis) alicui adjudicatum sit, id *statim* ejus fit, cui adjudicatum est.

§ 51. *The Acquisition of Ownership.*

B. Original Acquisition.

Modes of acquiring ownership are called 'original,' when they result in the independent creation of a new right of ownership, when their effect, therefore, is independent of the ownership of a definite third person. A person who acquires by an original mode, has no auctor. § 51.

I. Occupatio.

Occupatio is the most primitive of all modes of acquisition. It consists in taking possession of a thing which belongs to nobody, with the intention of becoming owner of it. Res nullius occupanti cedit. The following may be objects of occupatio: wild animals, shells or stones on the sea-shore, derelicts, and so forth.

Derelictio is the opposite of occupatio. It takes place when a person abandons the possession of a thing with the intention of

§ 51. abandoning the ownership of it, e. g. when I throw away the peel of an orange after eating the orange. The effect is to make the thing a res nullius the moment the abandonment of possession is physically complete. Anyone may therefore 'occupy,' and acquire ownership in, res derelictae.

There is of course a difference between derelict property and lost property. When we lose property, we part with it involuntarily. It is only the actual control of the thing that we lose, not the ownership of it. The thing is not a res nullius, but a res alicujus, and does not therefore admit of occupatio. The finder, so far from becoming owner of the thing, is bound, not only to keep and preserve it, but also to do what in him lies (e.g. by reporting his find to the police) to have the thing restored to its owner.

On the other hand, however, treasure trove ('thesaurus') is treated as a res nullius. Thesaurus, in the legal sense, is an object of value, which has been hidden for a very long time, so that the owner is at present unknown. Half the treasure goes to the finder (the 'occupans'), the other half to the owner of the land in which it was found.

As to hostile property, the rule in Roman law was that it admitted of occupatio, as soon as it came within Roman territory, but that, when it returned to the enemy's country, it reverted at once by the jus postliminii to its former owner. And, conversely, Roman property which returned from the hands of the enemy to Roman territory reverted at once to its Roman owner.

§ 12 I. de rer. div. (2, 1): Ferae igitur bestiae et volucres et pisces, id est omnia animalia, quae in terra, mari, caelo nascuntur, simulatque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. Quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno. Plane, qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi, ne ingrediatur.

§ 18 eod.: Item lapilli, gemmae et cetera, quae in litore inveniuntur, jure naturali statim inventoris fiunt.

II. Usucapio. § 51.

By usucapio, or prescription, we mean the acquisition of ownership by continuous possession.

Usucapio is one of those limitations which ownership is compelled to impose on itself in the interests of its own safety.

All security would cease, if a right of ownership could be asserted, without any limitations, for all time to come. There must be some moment at which the previous owner ceases to be owner, as against the present bona fide holder, and at which the bona fide holder becomes legally as well as practically the owner. The law of usucapio determines this moment.

There is yet another element. If an owner is forced to assert his title as against a third party, by means of an action at law, he will be obliged to prove his title. He himself may have acquired his property by traditio from the person previously in possession. That, however, is not sufficient to prove that he is owner. For traditio is a derivative mode of acquisition, and his predecessor (who is here his auctor) could only make him owner, if he (the auctor) was owner himself. A further necessity would therefore arise of proving the title of his predecessor. But the title of the latter may also be merely derivative; he may also have acquired his property (say, a house) by sale and traditio. This would carry us back to the predecessor's predecessor, and so forth—a process which might be continued *ad infinitum*. It is therefore simply impossible to prove a right of ownership on the strength of a derivative title alone. Hence the necessity of supplementing the derivative title by an original one. This original title is usucapio. There is no need for me to trace back the titles of all my predecessors. It is enough if I can prove that I acquired the thing bona fide, that I possessed it for a certain period, and that consequently I should, in any case, have acquired it by usucapio, even supposing the traditio itself had not been sufficient to make me owner. The purpose of the rules concerning usucapio is to make derivative titles, such as traditio, indefeasible after a certain time, and to render them independent of all previous titles.

Thus the necessity for a title by prescription, the necessity, in

§ 51. other words, for providing that, in certain circumstances, possession, even though in itself unauthorized, shall, after the lapse of a particular time, ripen into ownership, arises from the fact that, but for such title, rights of ownership would neither be safe nor capable of proof.

Early Roman law had not failed to observe this fact and recognized a mode of acquiring ownership by means of a possession (usus) continued, in the case of immovables, over a period of two years and, in the case of all other things, over a period of one year. This usucapio of the Twelve Tables, however, being an institution of the jus civile, was confined to Roman citizens, and was moreover objectively applicable to such things only as admitted of quiritary ownership. Thus all provincial soil was excluded from the operation of civil usucapio; for by Roman law the fundus provincialis could never be the object of private ownership (dominium ex jure Quiritium), but could only be owned by the populus Romanus. In reality, however, land could, of course, be dealt with in the provinces by sales and purchases, by inheritances and legacies, in a manner and to an extent which virtually made houses, gardens, farms, &c., the objects of private ownership. But the titles, such as they were, received no legal protection from the Roman jus civile. The provincial governors (praesides) however, introduced, by means of their edict, a form of legal protection called 'praescriptio longi temporis.' If a person, having come into possession of land on some lawful ground (justo titulo) and in good faith (bona fide), and having continued in the possession of such land for 'a long time,' were sued by a person alleging a prior title, he had a good defence to such an action and was protected by a so-called 'praescriptio,' i. e. a reservation made in his favour, differing in point of form from an exceptio in that it was placed at the head of the formula. A 'long time' was declared to mean ten years 'inter praesentes' (i. e. if both parties were domiciled in the same province), twenty years 'inter absentes (i. e. if they were domiciled in different provinces). Afterwards he was allowed a real action (in rem actio) against any third party, when the same conditions were forthcoming.

§ 51. Justinian fused the usucapio of the civil law and the longi temporis possessio of the magisterial law into a single system. Longi temporis possessio was adopted as the period of prescription for land, whether such land were a fundus Italicus or a fundus provincialis being now immaterial. In addition to this he retained the usucapio of movables, extending the term of prescription, however, from one year (as it was in the old law) to three years. In Justinian's law, therefore, ownership in land is acquired by usucapio in ten years inter praesentes, and in twenty years inter absentes; ownership in movables is acquired in three years. It is not necessary, for purposes of usucapio, that I should have been in actual possession myself during the whole period; for in calculating my term of possession I am allowed to reckon the possession of my predecessor from whom I acquired the property justo titulo. This is the so-called 'accessio possessionis.' It is moreover necessary that my possession should have originated in a lawful ground, a so-called 'justus titulus,' such as traditio or legacy, and that there should be good faith on my part, in other words, that I should be convinced of the legality of my possession (so-called 'bona fides'[1]). Res extra commercium (sup. § 46 I) are of course incapable of usucapio,

[1] The jurists had already required bona fides in the usucapio of the early law. But there was also a usucapio without bona fides, especially the so-called 'usucapio pro herede' (§ 97) and the 'usureceptio ex fiducia.' The latter name was applied to the case of a debtor, who, after mancipating a thing fiduciae causa (§ 59, I. 1) to his creditor, retains, or recovers, possession of it free of defect (i. e. without hire or precarium). The debtor can, in such a case, recover ownership in the thing by usucapio even without bona fides. If he has paid his debt, he can recover ownership in spite of hire and precarium. Since the requirement of bona fides was based, not on express statute, but merely on the interpretatio, it was within the power of the same interpretatio to fix the limits of the principle it had established. The only requirement imposed on usucapio by the Twelve Tables themselves was that the thing should not have been stolen.—The usureceptio ex fiducia, like the usucapio pro herede, was completed in one year even in the case of land. The 'fiducia' (i. e. the thing which was mancipated fiduciae causa) was, like a res hereditaria, counted among the 'ceterae res' for which the Twelve Tables fixed a usucapio of one year. There are cases when usucapio may take place on the ground of a merely supposititious title, a so-called 'titulus putativus,' which is, in reality, no title at all, the usucapio being based on bona fides alone. Usucapio of this kind occurs, when the facts of the case are such as to justify the belief in the existence of a title. For example: On my birthday a cask of wine is sent to me under circumstances which make it reasonable to suppose that it came as a present from my friend X. In reality, it was only delivered at my house by mistake. In such a case usucapio would be possible.

§ 51. because they cannot be objects of ownership at all. There are other things which, though in commercio, were nevertheless withdrawn from usucapio by positive enactment (the so-called 'res inhabiles'). Thus the Twelve Tables and the lex Atinia exempted res furtivae, the Lex Julia et Plautia res vi possessae. Connected with these exemptions is the rule of what is called extraordinary usucapio or prescription ('longissimi temporis praescriptio') which was introduced by Justinian. According to this rule, if a thing is a res inhabilis (i. e. is withdrawn from usucapio by positive enactment), or, if the possessor either has no title at all, or (though he has a title) is perhaps no longer in a position to prove it,—in such cases ownership can nevertheless be acquired by continuous possession extending over thirty, or forty, years, provided only that such possession was acquired bona fide. Assuming, then, that there is bona fides, it is sufficient for the purposes of this usucapio, if the conditions required for the limitation of an action (sup. p. 206) are satisfied. If a person, having acquired bona fide possession of a thing, remains in possession so long that the action for the assertion of ownership is, as against him, barred by limitation, he not only has the benefit of the plea of limitation, but is positively entitled to be regarded as owner, and is consequently entitled, if he loses possession of the thing, to enforce his ownership by action against every other person.

In classical Roman law usucapio performed a twofold function. In the first place, it served the purpose of transforming bonitary into quiritary ownership, in other words, of perfecting a legal title in cases where a thing was acquired from its owner. For the right of a person in a res mancipi which had been informally conveyed to him, only passed into quiritary ownership, when supplemented by a usucapio extending over one, or two, years. In the second place, usucapio was used for the purpose of protecting the title of a person who had acquired a thing bona fide from one who was not the owner. For example: A's heir sells and delivers to B a thing which he has found among the property left by A and which he erroneously supposes to have belonged to A. The necessity for usucapio arose, in the first case, from a defect in the form of the transfer; in the

second case, from a defect in the right of the auctor. In Justinian's law the antithesis between modes of acquisition which are free from formal elements (juris gentium), and those which require formalities (juris civilis), has disappeared. Every mode of acquisition confers full ownership, provided always that, in the case of derivative titles, the auctor was really owner. Thus usucapio ceases to have any application wherever a thing is acquired from its owner, and only the second function remains: the function, namely, of making a person, after a certain time, owner of a thing which he acquired from one who was not its owner. § 51.

pr. I. de usuc. (2, 6): Jure civili constitutum fuerat, ut, qui bona fide ab eo, qui dominus non erat, cum crediderit eum dominum esse, rem emerit, vel ex donatione aliave qua justa causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobilis, biennio tantum in Italico solo usucapiat, ne rerum dominia in incerto essent. Et cum hoc placitum erat, putantibus antiquioribus, dominis sufficere ad inquirendas res suas praefata tempora, nobis melior sententia resedit, ne domini maturius suis rebus defraudentur, neque certo loco beneficium hoc concludatur. Ed ideo constitutionem super hoc promulgavimus, qua cautum est, ut res quidem mobiles per triennium usucapiantur, immobiles vero per longi temporis possessionem, id est inter praesentes decennio, inter absentes viginti annis usucapiantur: et his modis non solum in Italia, sed in omni terra, quae nostro imperio gubernatur, dominium rerum, justa causa possessionis praecedente, adquiratur.

§ 1 eod.: Sed aliquando, etiam si maxime quis bona fide rem possederit, non tamen illi usucapio ullo tempore procedit: veluti si quis liberum hominem vel rem sacram vel religiosam vel servum fugitivum possideat.

§ 2 eod.: Furtivae quoque res et quae vi possessae sunt, nec si praedicto longo tempore bona fide possessae fuerint, usucapi possunt: nam furtivarum rerum lex duodecim tabularum et lex Atinia inhibet usucapionem; vi possessarum lex Julia et Plautia.

III. Accession.

'Accession' is the name given to a thing which, having previously

§ 51. existed as an independent thing, has passed into an integral part of another thing, e. g. a plant which I plant on my land. A thing which becomes an accession ceases to have an independent existence. But we have seen that there can only be ownership in independent things, not in parts of things (sup. p. 225). As soon, therefore, as a thing becomes an accession, all former rights of ownership in it are destroyed, because its existence as an independent thing is destroyed. If I am the owner of the principal thing (i. e. the thing in which the other is merged), I also become, beyond doubt, the owner of the accession (e. g. the plant), even though it (the accession) belonged to somebody else before. For the accession, by becoming an indistinguishable ingredient of *my* thing, passes, by the necessary operation of the law, under *my* right of ownership in the thing, without prejudice, however, to the right of the previous owner to recover compensation from me. It is in this sense that accession is a mode of acquiring ownership, and it is an original mode, because it is a matter of indifference who the owner was before the union took place.

The following are examples of accession: 'implantatio'; 'inaedificatio,' when a house, as a whole, becomes the accession of the land on which it stands; 'alluvio,' the accretion by which a public river, in an imperceptible manner, enlarges a piece of land; 'avulsio,' the accretion by which a public river enlarges a piece of land in a perceptible manner, viz. by carrying away a large portion of the land higher up the river and adding it to mine; as soon as this addition is firmly attached to my land, it is an accession, and as such becomes my property; 'alveus derelictus,' the derelict bed of a public river which has changed its channel; the bed, which thus becomes free, follows the ownership of the riparian owner on each side as an accession, the middle of the bed forming the boundary; 'insula nata,' when part of the bed of a public river becomes free, in which case the rule is the same as in the case of alveus derelictus.

§ 20 I. de rer. div. (2, 1): Praeterea quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intellegere non possis,

quantum quoquo momento temporis adjiciatur. § 21: Quod si vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit, palam est, eam tuam permanere. Plane si longiore tempore fundo vicini haeserit, arboresque, quas secum traxerit, in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquisitae esse. § 51.

§ 22 eod.: Insula, quae in mari nata est (quod raro accidit) occupantis fit, nullius enim esse creditur; at in flumine nata (quod frequenter accidit) si quidem mediam partem fluminis teneat, communis est eorum, qui ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cujusque fundi, quae latitudo prope ripam sit. Quod si alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam praedia possident.

IV. Specification.

'Specification' is the working up of a thing into a new product. The baker, the carpenter, the wine-presser, the manufacturer, &c., convert the raw material into a product of labour which invariably possesses a higher economic value than the raw material. The labour results in the creation of a new form. This economic power of production is held to confer on the person who supplies the labour a right to claim the product as his own. That is to say, the manufacturer (specificans) who creates the new product—whether by his own labour, or, if he is an employer of labour, by that of others—becomes owner of the thing he has manufactured, his title being independent of that of any previous owner, and for that reason original, provided that he was acting bona fide and that (in accordance with a positive enactment of Justinian) the thing can no longer be restored to its previous shape. These limitations do not apply, if the specificans was owner of part of the materials.

§ 25 I. de rer. div. (2, 1): Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utrum is, qui fecerit, an ille potius, qui materiae dominus fuerit: ut ecce, si quis ex alienis uvis, aut olivis, aut spicis vinum, aut oleum, aut frumentum fecerit aut ex alieno auro vel argento vel aere vas aliquod fecerit. . . . Et post

§ 51. multas Sabinianorum et Proculianorum ambiguitates placuit media sententia existimantium, si ea species ad materiam reduci possit, eum videri dominum esse, qui materiae dominus fuerit; si non possit reduci, eum potius intellegi dominum, qui fecerit. Ut ecce vas conflatum potest ad rudem massam aeris, vel argenti, vel auri reduci, vinum autem, aut oleum, aut frumentum ad uvas et olivas et spicas reverti non potest. . . . Quodsi partim ex sua materia, partim ex aliena speciem aliquam fecerit quisque, veluti ex suo vino et alieno melle mulsum, aut ex suis et alienis medicamentis emplastrum aut collyrium, aut ex sua et aliena lana vestimentum fecerit, dubitandum non est, hoc casu eum esse dominum, qui fecerit, cum non solum operam suam dedit, sed et partem ejusdem materiae praestavit.

V. Fructus.

'Fructus' are the products which give to the thing that produces them its special value, e. g. the milk of a cow, the offspring of animals, the produce of fields and gardens. In certain cases a person other than the owner of the principal thing becomes owner of the fruits, for example, a tenant, a usufructuary, also a bonae fidei possessor. A person who possesses another man's property in good faith, nevertheless acquires ownership in the fruits of such property; and if subsequently the owner takes an action against him, he (the bonae fidei possessor) is not required to restore the fruits he has consumed in good faith, but is only bound to restore the principal thing, together with such fruits as were extant at the moment of the action being taken. But as soon as the action has commenced, he must know that, possibly, he is in possession of another man's property. From the moment of litis contestatio therefore, he is bound to apply the utmost care (omnis diligentia) in the cultivation of the fruits. If the plaintiff succeeds in proving his ownership, he can claim the restoration of all the fruits gathered during the action (fructus percepti), and can also claim damages for such fruits as the defendant could have gathered by the exercise of due care (fructus percipiendi).

NOTE.

The Different Unions of Things.

THE union of two or more things into one—as when I mix the contents of two bottles of wine—is one of the processes which, by the necessary operation of the law, effect a change of ownership. The question arises, who shall be considered owner of the new thing? Different cases are determined by different rules of law. Some of these cases have already been discussed. The purpose of this note is to bring out clearly the broad principle which governs them all. § 51.

The following rules supply an answer to the question concerning the legal effect of a union of things as such, quite apart from the intention of the owners.

The union of several things into one is either (1) a union in the narrower sense of the term, or (2) an accession, or (3) a specification.

A 'union,' in the narrower sense, occurs, when the new thing is the same in kind as *both* the pre-existing things, e. g. when water is mixed with water, wine with wine, or when silver is fused with silver or gold with gold. Both the former things continue, in this sense, to exist in the new thing. The rule applying to such cases is this: if the several things belonged to different owners, the effect of the union is to make the former owners joint owners of the new thing, in the proportion in which their things contributed to the production of the new thing.

If however the new thing is identical in kind with only *one* of the pre-existing things, we have a case of 'accession.' This happens, e. g. when an arm is so joined to a statue by ferruminatio (cp. Dernburg, *Pandekten*, § 209, note 6) as to make the whole thing one; the new thing is a statue which the arm was not. The same thing occurs, e. g. when a new leg is put on a table, or when a rose is planted in my land. In the latter case, as soon as the rose has struck root, only *one* thing exists, viz. the land; the rose has ceased to exist as an independent thing. In all these instances one of the things maintains its identity in spite of the union. It determines the character of the new thing. It has, so to speak, absorbed and consumed the other. Hence it is called the principal thing in contradistinction to the accessory, i. e. the thing (in the above cases the arm, the rose) which continues to exist only as a modification or enlargement of the other by which it is absorbed. The rule of law here is that the owner of the principal becomes the owner of the accessory, which *his* thing has consumed. The owner of the accessory is limited to a claim for compensation. The owner of the principal thing therefore becomes the sole owner of the new thing.

§ 51. Specification, lastly, may very well occur without any union, as when a dress is made out of a piece of cloth, but it may frequently be the result of a union of several things, as in the case of a picture. A union amounts to a specification, if the new thing is different in kind from each of the former things; in other words if, economically speaking, *none* of the former things continue to exist in the new thing. In such cases the rule already set forth applies: the ownership in the materials is destroyed and the owners of the former things are, all of them, limited to a claim for compensation. The new thing becomes the property of the specificans, provided always that the conditions for acquiring ownership as stated above (under IV) are satisfied.

If we keep the principle thus stated steadily in view, we shall find no difficulty in distinguishing between cases of specification and accession. If I paint a picture, using, for the purpose, in all good faith, another man's colours and canvas, whose is the picture? That will depend on circumstances. If the result of the painting is merely painted canvas, we have an instance of accession, because one of the things outlasts the union (this would apply e. g. to the case of a painted drop-curtain or a so-called painting which is really nothing more than a daub). The owner of the canvas (tabula) therefore becomes the owner of the colour. But if the result of the painting is a picture, we have a case of specification, because the product is a third thing which is neither colour nor canvas, the material being merged in the work of art. Fresco painting is necessarily a case of accession and not of specification, because the building continues as before and the immovable property outlasts the union. The same distinction may be applied to writing. If the result of the writing is merely paper that is written on, we have a case of accession, if it is a piece of writing (e. g. a deed), we have a case of specification.

Even the Roman jurists show some uncertainty in deciding the several cases (e. g. in regard to pictura and scriptura, cp. l. 23 § 3 D. 6, 1, where the question is argued entirely as a case of accession). Nevertheless the fundamental idea is clear. The question will always be whether both the former things, or one of them, or none of them, can be regarded as, economically speaking, continuing to exist. The ownership of the thing follows the changes in its economic condition.

§ 52. *The Protection of Ownership.*

§ 52. There are two actions by which an owner may protect his ownership: the rei vindicatio and the actio negatoria.

I. Rei Vindicatio.

Rei vindicatio is the action employed by an owner when a third

person is in possession of his property (ubi rem meam invenio, ibi vindico). It is therefore an action by which an owner who is not in possession sues a non-owner who is in possession. If the defendant has some right in regard to the thing which entitles him to withhold it from the owner (e. g. a right of pledge, a usufruct, a right as hirer), such right is protected by means of an exceptio. Failing this however, he must restore to the successful plaintiff (the owner) the thing itself with all the accessions that have accrued (cum omni causa)[1]. § 52.

II. Actio Negatoria.

The actio negatoria is the action by which an owner protects himself against a mere disturbance of his possession. It is therefore, as a rule, the action by which the owner who is in possession secures the integrity of his possession. The defendant is the person who has disturbed the possession of the owner. He is compelled to discontinue the disturbance and to pay the owner full compensation for damage.

§ 53. *The Protection of Usucapio Possession.*

If a person is in usucapio possession of a thing belonging to another, and continues in such possession till the usucapio is complete, he acquires, of course, together with the ownership of the thing, the remedies which are incident to ownership, viz. the rei vindicatio and the actio negatoria. In certain cases, however, the praetor deems it desirable to protect a usucapiens even before his usucapio is complete. It was with a view to this purpose that he introduced the actio Publiciana in rem, an action of ownership which is granted on a fiction that the period of usucapio is already complete—granted, in other words, to a possessor who wants nothing but the lapse of a certain time to constitute him owner (sup. p. 181). § 53.

[1] Hence the above-mentioned liability of the bonae fidei possessor to restore not only the principal thing, but also the fruits (sup. § 51 v.). The liability of the malae fidei possessor is still more rigorous; for since he knows he is in possession of another man's property, he is responsible for fructus percipiendi during the whole period of his possession, including therefore the time prior to the litis contestatio. Cp. sup. p. 195 n. 4.

§ 53. The practical result, then, is that the usucapio possessor is given a rei vindicatio (in the form of the actio Publiciana) even before he is really owner. In the same way he is also given the actio negatoria. But inasmuch as the plaintiff, in such cases, is not yet real owner, the actio Publiciana is weaker in two respects than a genuine action of ownership. For, in the first place, if at the time of the action the true owner is either in possession himself, or is disturbing the possession of the usucapio possessor, he can meet the actio Publiciana with the exceptio dominii and cannot therefore be condemned. In the second place, if the defendant has usucapio possession of the same thing which the plaintiff formerly held in usucapio possession, but subsequently lost—in such a case the plaintiff will only succeed if both he and the defendant derive their title from the same auctor, and his (the plaintiff's) title is prior to that of the defendant. If, on the other hand, the defendant's title is derived from a different auctor, or if, though derived from the same auctor, it is prior to that of the plaintiff, the defendant is likewise protected by an exceptio and judgment will pass in his favour.

In other respects, however, the result of the actio Publiciana is the same as that of a genuine action of ownership. Thus when possession is withheld, the actio Publiciana in rem serves the purposes of a rei vindicatio (and when we speak of the actio Publiciana, simply, we usually think of it as employed for this purpose); when, on the other hand, possession is merely disturbed, it serves the purposes of an actio negatoria (the so-called 'actio Publiciana negatoria').

The object of the actio Publiciana is not to enable a usucapio possessor to deprive an owner of that which belongs to him—it is for this very reason that the owner has the exceptio dominii—but rather to protect a usucapio possessor against a person whose title is weaker than his own. But it can also be employed for yet another purpose. The owner himself may resort to the actio Publiciana, if he is obliged to take legal proceedings on account of the withholding or disturbing of possession. And for this reason: he may urge that, quite apart from the question of his ownership, the requirements of usucapio possession are certainly satisfied in his case. Like a usucapio possessor he has purchased the thing, or acquired

it on some other lawful ground. His possession is likewise accompanied by bona fides. This is quite sufficient to entitle him to the actio Publiciana, and to enable him to defeat his adversary who has no right in the thing. There is no need for him to proceed by a formal rei vindicatio and to prove that he has already acquired full ownership. § 53.

This last remark leads us to what is, in practical life, the principal domain of the actio Publiciana. In actual practice (i. e. in the vast majority of cases) the actio Publiciana is brought by the owner, not however in his capacity of owner, but in his capacity of usucapio possessor. The ultimate purpose of the legal rules concerning the protection of usucapio possession is to supply ownership with a second group of remedies available under easier conditions than those required in the formal and genuine actions of ownership. That such was the ultimate purpose of the actio Publiciana is clearly shown in Roman law itself. The action is open not only to a usucapio possessor who has acquired a thing a non domino, but also to a bonitary owner who has acquired a thing (a res mancipi, namely, by bare traditio) a domino—a bonitary owner being also a usucapio possessor in regard to quiritary ownership (cp. sup. p. 242). In Roman law therefore the actio Publiciana was employed, even formally, as an action of ownership, for the purpose, namely, of protecting bonitary ownership.

> Gaj. Inst. IV § 36: Datur autem haec actio (Publiciana) ei, qui ex justa causa traditam sibi rem nondum usucepit, eamque amissa possessione petit. Nam quia non potest eam EX JURE QUIRITIUM SUAM ESSE intendere, fingitur rem usucepisse, et ita, quasi ex jure Quiritium dominus factus esset, intendit, veluti hoc modo: JUDEX ESTO. SI QUEM HOMINEM A. AGERIUS EMIT, ET IS EI TRADITUS EST, ANNO POSSEDISSET, TUM SI EUM HOMINEM, DE QUO AGITUR, EX JURE QUIRITIUM EJUS ESSE OPORTERET, et reliqua.
>
> L. 17 D. de Publ. act. (6, 2) (Neratius): Publiciana actio non ideo comparata est, ut res domino auferatur (ejusque rei argumentum est primo aequitas, deinde exceptio SI EA RES POSSESSORIS NON SIT), sed ut is, qui bona fide emit, possessionemque ejus ex ea causa nactus est, potius rem habeat.

§ 54. *The Protection of Juristic Possession.*

Possession and Ownership.

§ 54. From ownership we must distinguish possession. Ownership is the legal, possession, as such, merely the physical, control over a thing. To possess is to *exercise* ownership, and, generally speaking, the law intends the owner to be at the same time the possessor. Hence in ordinary language ownership and possession are often used as convertible terms. Nevertheless the conception of ownership and possession ought to be clearly distinguished. I may be owner without having possession and, conversely, I may have possession without being owner (as in the case of a theft). The conception of possession is opposed to that of ownership in the same sense in which the conception of factum is opposed to that of jus.

Now it is obvious that there may be a great many different kinds of possession, i. e. of actual control over things.

In the first place, I may hold a thing in my hands, and may perhaps hold it in my own interests (e. g. a book which I have borrowed), but may nevertheless acknowledge another person (in this case the lender of the book) to be the real dominus of the thing, so that, in taking care of it, or in otherwise dealing with it, it is my intention to preserve it, not only for myself, but also for the other person. In this case I have merely the corpus, i. e. the external element of possession. I am without the animus of possession, i. e. the will coinciding with the physical relationship. Though I hold the thing in my hands, I do not wish to hold it for myself alone, but, in the last instance, for some one else. The holder in this case lacks the animus rem *sibi* habendi. What he has is rather the animus rem *alteri* habendi. Such a relationship is described as mere 'detention.' The person who has detention (e. g. the borrower, hirer, lessee, depositary, mandatary) possesses the thing in subordination to another person. In possessing, he represents another person. This other person (viz. the lender, lessor, &c.) possesses *through* the person who has detention.

In the second place, however, I may hold a thing in my hands

and may intend, at the same time, to hold it for myself alone, either § 54.
because, say, I am the owner, or at least, believe myself to be the owner, or, perhaps, in spite of my knowledge that I am not the owner, it being my decided intention to keep the thing for myself alone, notwithstanding my knowledge of its ownership (as in the case of a thief, whose actual relation to the thing he holds is indistinguishable from that of the owner). In all such cases I have not merely the corpus, but also the animus of possession, i. e. I have the will coinciding with the physical relationship. I not only hold the thing in my hands, but intend to hold it for myself alone. This is the animus rem sibi habendi or, as it is called by modern writers, the 'animus domini.' I hold the thing in the same way as if I were its owner, i. e. as if I had legally sole control over it, whether I am really the owner or not, and whether again, in the latter case, I know I am not the owner (as in the case of a thief) or otherwise (as in the case of a bonae fidei possessor or usucapio possessor).

This second kind of possession is technically known as 'juristic possession.' Two elements therefore go to make up juristic possession: (1) corpus (detention), the physical control over a thing, whether I have the corpus myself, or through the medium of a person who has detention (e. g. a borrower, lessee, &c.); (2) the animus (scil. domini), or the intention to hold the thing for oneself alone. If A hands over a thing to B for purposes of mere detention (as in a loan, a lease, a mandatum, &c.), the direct holder of the corpus (the borrower, &c.) has only detention, whereas the indirect holder (the lender, lessor, mandans, &c.) has juristic possession.

Juristic possession—and it is to this fact that its name is due—gives rise to certain legal remedies which are granted for the purpose of protecting it. These remedies are the so-called 'possessory interdicts' of which, in Justinian's law, there are the following:

(1) The Interdictum uti possidetis.

The interdictum uti possidetis is an interdictum 'retinendae possessionis,' because it is designed to preserve ('retain') the existing juristic possession. It is employed in cases of a mere disturbance of possession, but only where the disturbance is of such a character as to interfere permanently with the possession. Thus it would

§ 54. apply if my neighbour were to erect buildings on his land interfering with my possession, but not if a person were merely to disturb me by tapping at my windows at night. In claiming an interdict, the juristic possessor claims, at the same time, a recognition of his juristic possession, the discontinuance of the disturbance, and indemnification for the disturbance which has already taken place. No one, however, is deemed a juristic possessor for purposes of this interdict, unless his juristic possession was acquired nec vi nec clam nec precario ab adversario[1]. No person who has acquired juristic possession from his adversary in the suit either by force (vi) or clandestinely (clam, i. e. anticipating the opposition of his adversary and secretly evading it) or by permission (precario, i. e. on terms of revocation at will, no binding transaction being concluded with the grantor), is held to have juristic possession for purposes of the possessory suit, the juristic possession being deemed, on the contrary, to vest in the adversary from whom the thing was acquired vi, clam, precario. To the latter therefore the possession of the thing must be delivered up. Thus if the plaintiff, being in possession, proceeds by the interdict uti possidetis for disturbance of possession against the person from whom he himself had acquired juristic possession vi, clam, or precario, the result may be that *the plaintiff* is condemned to deliver up possession to the defendant. It is in

[1] Before Justinian the interdictum uti possidetis only applied to immovables, movables being dealt with by another interdictum retinendae possessionis, namely the interdictum utrubi. In the case of the interdict uti possidetis (concerning immovables) the winner was the party who was in possession at the time (scil. of the granting of the interdict by the praetor), provided he had obtained his possession nec vi nec clam nec precario ab adversario. In the case of the interdict utrubi (concerning movables) the winner was the party who had been in possession the greater portion of the year immediately preceding (scil. the granting of the interdict), provided he had obtained his possession nec vi nec clam nec precario ab adversario; and in calculating the time he was allowed to reckon in the time during which his auctor had been in possession ('accessio possessionis,' cp. p. 241.) But the practice of the Eastern Empire extended the principles of Uti possidetis to Utrubi (utriusque interdicti potestas exaequata est), and this extension was confirmed by the Corpus juris of Justinian (§ 4 I. 4, 15; l. 1 § 1 D. 43, 31). The interdict uti possidetis was thus, in substance, made applicable to movables as well, so that, in the case of movables, as well as immovables, disputes concerning possession were decided entirely by reference to the question as to who was in possession at the date of the suit, i. e. at the date of the litis contestatio (the granting of the interdict in the old way having fallen into disuse, p. 216). Cp. Fitting, *ZS. f. RG.*, vol. ii. p. 441.

this sense that the interdict uti possidetis is described as an interdictum 'duplex'—the command of the praetor being addressed to both parties—and that the action ex interdicto uti possidetis (formal interdicts having ceased to exist in Justinian's time, p. 216) is reckoned among the 'judicia duplicia,' or 'double-edged' actions, the peculiarity of which is that both parties sustain at the same time the rôle of plaintiff and defendant, so that not only the defendant, but also the plaintiff may be condemned [2]. § 54.

2. The Interdictum unde vi and Interdictum de precario.

The interdicta unde vi and de precario are both interdicta 'recuperandae possessionis.' They are employed for the purpose of recovering a juristic possession which has been lost. The interdict unde vi is used in cases of violent dispossession (i. e. by physical force, 'ejectment'), the interdict de precario in cases where possession has been lost through one party allowing the other the use of a thing, without making any definite agreement as to the restitution thereof, in other words, without concluding any juristic act [3]. The interdict unde vi is directed against the ejector as such, and takes no account of the question whether he (the ejector) is still in possession or not, whether he carried out the ejectment himself or through others, or lastly whether the plaintiff himself had acquired the thing from the ejector vi, clam, precario, or otherwise. Thus, whereas in the case of the interdictum uti possidetis the defendant

[2] Partition suits (inf. § 70) are the other judicia duplicia.

[3] This fact, viz. the non-conclusion of any agreement between the parties, constitutes the difference between precarium, on the one hand, and the contracts of locatio conductio and commodatum, on the other. Even if, in the case of precarium, certain terms are agreed on between the parties, such terms are not intended to have any legally binding force. Precarium always means permissive possession till further notice, and nothing more—a possession, therefore, which is revocable at any moment; whereas, in the case of locatio conductio and commodatum, the right to use the thing can only be revoked after the expiry of the period agreed upon. If the person holding precario has agreed to pay a rent (which was frequently the case in the classical times, though it would seem that, originally, precarium was a gratuitous permission to use a thing), such rent was nevertheless irrecoverable by action. Precarium signifies a relation which is purely one of fact, without any mutual concession of rights, and even the right of the precario dans to have the thing which he gave precario restored to him, is based, not on any promise, not (as in the cases of locatio conductio and commodatum) on an obligation, but solely on the fact that the other party *precario habet*. The Roman precarium originated perhaps in the permissive possession of clients, when patrons allowed their clients to occupy lands for the purpose of enabling them to obtain a livelihood.

§ 54. can plead that the plaintiff acquired the thing from him vi, clam or precario (the so-called 'exceptio vitiosae possessionis'), with the result that, as we have just explained, the plaintiff himself may be condemned, in the case of the interdict unde vi this exceptio vitiosae possessionis is inadmissible. In the same way the interdictum de precario is directed against the precario habens as such, i. e. the person who precario habet from the plaintiff or 'dolo malo fecit, ut desineret habere.' The interdictum unde vi, however, applies only to immovables, the interdictum de precario also to movables. The interdictum unde vi as well as the interdictum uti possidetis is barred intra annum (utilem); post annum there is only an action for the recovery of the amount by which the defendant has been enriched. The interdictum de precario, on the other hand, is only barred within the ordinary period of limitation, i. e. thirty or forty years, as the case may be.

The above-mentioned possessory interdicts (retinendae and recuperandae possessionis) can be claimed by the juristic possessor as such, quite apart from the question, whether he really has any right in the thing or not. His possession entitles him to a legal remedy—and it is for this reason that interdicts are called 'possessory' remedies—quite irrespectively of his right. Nay, the question of right is positively excluded. It is no defence for the defendant to appeal to his right in the thing.

Nevertheless in their practical result, these possessory remedies, while formally only protecting possession, uniformly serve the purpose of protecting ownership. In the great majority of cases it is the owner who, together with his ownership, has, or has had, the juristic possession. The owner, consequently, has, as a rule, the choice of the following remedies:

(1) He may sue by a 'petitory' action, i. e. on the ground of his right in the thing itself and prove his ownership (§ 52).

(2) He may sue by a 'petitory' action, and merely prove his usucapio possession (actio Publiciana), i. e. leaving his title as owner out of the question, he may contend that, in his case, the requirements of usucapio possession are satisfied (§ 53).

(3) He may proceed by a possessory remedy and confine himself

to proving his juristic possession, i. e. leaving his title, not merely as owner, but also as usucapio possessor out of the question, he may merely contend that, in his case, the requirements of juristic possession (i. e. actual control over the thing accompanied by the animus domini) are satisfied and take effect[4]. § 54.

Nothing proves more strikingly the vast economic importance of ownership than the abundance of legal remedies which were developed for its protection.

L. 12 § 1 D. de adq. poss. (41, 2) (Ulpian.): Nihil commune habet proprietas cum possessione.

L. 1 § 2 D. uti possid. (43, 17) (Ulpian.): Separata esse debet possessio a proprietate; fieri etenim potest, ut alter possessor sit, dominus non sit, alter dominus quidem sit, possessor vero non sit; fieri potest, ut et possessor idem et dominus sit.

L. 3 § 1 D. de adq. poss. (41, 2) (Paulus): Et apiscimur possessionem corpore et animo, neque per se animo, aut per se corpore.

II. Jura in re aliena.

§ 55. *Jura in re aliena in general.*

The exigencies of human intercourse cannot be permanently satisfied by ownership alone. It must be possible for a person to deal in a manner authorized by the law with things which belong to others. § 55.

The need which we thus experience in the conduct of our affairs for supplementing our own property by the property of others, without being obliged to acquire ownership in this property, may be satisfied, to some extent, by means of obligatory transactions concluded with the owner, such as agreements to let or to lease. But in all such cases, since the right we acquire is merely an obligatory right (§ 60), it is only available against the person of the obligeor.

[4] Cp. Jhering, *Jahrbücher f. Dogmatik des heutigen röm. Rechts*, vol. ix. p. 44 ff.

§ 55. If, for example, a lessee is disturbed in the possession and enjoyment of his land by a person other than the lessor, his rights as lessee do not, in Roman law, entitle him to sue the disturber; he must address himself first to the lessor, so that the latter may interfere to prevent the disturbance and, if necessary, take legal proceedings.

Thus the rights which we acquire in regard to property of others by means of obligatory transactions are but incomplete, because their effect is merely personal. The need therefore which we are here discussing is not adequately met by transactions of this description. There must be rights in regard to the property of other persons which enjoy a more effectual protection.

It was for the purpose of satisfying this want that the *real* rights in re aliena were developed. The rights they confer in regard to the thing are stronger, in the sense that they are directly operative and enforceable as against any third party. It is with these real rights in re aliena, which the Romans call 'jura in re' simply, that we have to deal in the following sections. The common characteristic, legally speaking, of all these rights, and that which distinguishes them from ownership, is this, that the rights of control over things which they confer are limited in regard to their contents, although, like ownership, they are directly available against any other person who interferes with them. In other respects the several jura in re differ essentially from one another in regard to the nature and extent of the control which they confer.

The jura in re developed in Roman law are comparatively few, to wit: (1) Servitudes; (2) Emphyteusis; (3) Superficies; (4) Pledge.

§ 56. *Servitudes.*

§ 56. The object of Servitudes is to enable persons other than the owner of a thing to share in the benefits derivable from the use of that thing, while preserving the interests of the owner as fully as possible. The ownership is said to 'serve' ('servit'), i. e. it is curtailed, it is not absolutely free, though, at the same time, its economic effect is not done away with. On the contrary, as against the servitude, ownership is the dominating right. The old civil law of

the Romans very characteristically, therefore, refuses to tolerate and admit any jura in re side by side with ownership except servitudes. It insists that, on principle, ownership shall be free, and consequently declines to acknowledge the jura in re otherwise than in the restricted form of servitudes. All the other jura in re were developed at a later period, either by the praetor (the right of pledge and superficies, §§ 58, 59), or by the legislation of the later empire (emphyteusis, § 57). § 56.

The restrictions which are imposed upon servitudes in the interests of ownership are twofold. In the first place servitudes only confer on the person entitled certain specific and clearly defined rights of user; in the second place, they are inalienable and non-transmissible, being annexed to a definite subject whose destruction entails the destruction of the right. Servitudes may be defined as real rights of user in a res aliena, limited in their nature and annexed to a definite given subject.

The subject of a servitude is determined in one of two different ways. It is either a definite person, in which case we have a 'personal' servitude, or it is determined by reference to a thing, in which case we have a 'real' or 'praedial' servitude. In the case of praedial servitudes, the owner of the land, for the time being, is the person entitled to the servitude.

Personal servitudes are extinguished by the death of the person entitled, so that, at most, they are rights enjoyed for a life-time. And in Roman law capitis deminutio—in the classical period even capitis deminutio minima (sup. p. 125)—has the same effect as death. On the other hand, praedial servitudes are not (in the absence of other reasons) extinguished till the land itself is destroyed. Personal servitudes which, in respect of the rights they confer, are uniformly wider in scope than praedial servitudes, are all the more restricted in point of duration; praedial servitudes, on the other hand, which may last for ever, are all the more decidedly restricted in respect of their contents.

I. Personal Servitudes.

The most important personal servitudes are: ususfructus, usus, habitatio, operae servorum.

§ 56. (*a*) Usufructus.

A Usufruct confers a real right—for life, at most—to enjoy to the full, and to take the fruits of, a thing not one's own. The usufructuary may choose whether he will have the use and fruits, as they are, or in the shape of a money equivalent, viz. by selling or letting the *exercise* of the usufruct to a third party. After the expiry of the usufruct, the thing must be restored. Hence res consumtibiles (p. 227) do not admit of a usufruct. A so-called 'quasi ususfructus' in consumable things (as, for example, when I am bequeathed the usufruct of 1000 bottles of wine, or of a certain amount of capital) is not a true usufruct, but rather ownership which I acquire in the consumable things, subject to a duty—which, of course, falls on my heir—to restore, after my death, the same quantity and quality of consumable things, or their value in money, as I myself had received. Practically, therefore, the result is the same as with a verus ususfructus, but the legal form which the transaction assumes is not that of a usufruct, but of ownership encumbered with an obligation. Every usufructuary with a verus ususfructus must give security that, after the expiry of the usufruct, he will restore the thing and will compensate the owner for any damage done to the thing through his (the usufructuary's) fault ('cautio usufructuaria'). And in the same way, a quasi-usufructuary is required to give security that he will pay the same quality and quantity as he received. The fact that the quasi-usufructuary is thus bound to give a cautio usufructuaria reduces the ownership he acquires in the res consumtibiles, in some degree, to the level of the rights of a mere usufructuary.

(*b*) Usus.

A Usus confers a real right—for life, at most—to enjoy and take the fruits of a thing not one's own, so far as is necessary for the satisfaction of the usuary's personal requirements. A usuary is therefore debarred, on principle, from letting or selling. Like the usufructuary he must give security ('cautio usuaria') that he will restore the thing after the expiry of the usus, and that he will exercise care in using the thing, with the alternative of paying damages.

(*c*) Habitatio. § 56.

Habitatio is a real right—for life, at most—to live in a house not one's own, but to live there after the manner of a person entitled to maintenance. That is to say, whereas not only a usufructuary, but also a usuary of a house, has the right to determine for himself in what manner, and in what part of the house, he will live, in the case of habitatio, it is the owner of the house who determines in what manner and in what part of the house the habitator shall live. The habitator, however, is entitled to let out to others the rooms assigned to him for habitation instead of occupying them himself. In other words, he is allowed to realize, in the shape of a money equivalent, the benefit which it is intended to confer on him by granting him the habitatio for the purpose of enabling him to support himself.

(*d*) Operae Servorum.

By 'operae servorum' is meant a limited right to the use of another person's slave. It is a real right—for life, at most—to make use of the working powers of another man's slave, either by accepting his services oneself, or by letting them out to others. Neither habitatio nor operae servorum (the latter of which seem, like habitatio, to have been granted for purposes of maintenance) are extinguished —even in the classical law—by capitis deminutio minima.

pr. I. de usufr. (2, 4): Usufructus est jus alienis rebus utendi fruendi, salva rerum substantia.

§ 1 Inst. de usu et hab. (2, 5): Minus autem scilicet juris in usu est, quam in usufructu. Namque is, qui fundi nudum usum habet, nihil ulterius habere intellegitur, quam ut oleribus, pomis, floribus, feno, stramentis, lignis ad usum cottidianum utatur; in eoque fundo hactenus ei morari licet, ut neque domino fundi molestus sit: neque his, per quos opera rustica fiunt, impedimento sit: nec ulli alii jus, quod habet, aut vendere, aut locare, aut gratis concedere potest, cum is, qui usumfructum habet, potest haec omnia facere.

L. 1 pr. D. usufructuarius quemadmodum caveat (7, 9) (Ulpian.): Si cujus rei usufructus legatus sit, aequissimum praetori visum est, de utroque legatarium cavere: et usurum se boni viri arbitratu, et, cum usufructus ad eum pertinere desinet, restituturum, quod inde extabit.

§ 56. II. Praedial Servitudes.

Praedial servitudes are either 'servitutes praediorum rusticorum,' i. e. servitudes which usually occur in favour of a plot of agricultural land, or 'servitutes praediorum urbanorum,' i. e. servitudes which usually occur in favour of buildings.

(*a*) Rural Servitudes.

The most important rural servitudes are: the several rights of way (servitus itineris, actus, viae); the right of conducting water over another's land (servitus aquaeductus); the right of drawing water on another's land (servitus aquae hauriendae).

(*b*) Urban Servitudes.

The most important urban servitudes are: the servitus altius non tollendi, i. e. the right to prevent buildings being raised above a certain height on the adjoining land; the servitus tigni immittendi, i.e. the right of placing the beam on which my story rests in my neighbour's wall; the servitus oneris ferendi, i. e. the right to use my neighbour's wall to support my own; the servitus stillicidii, i. e. the right to let my rain-water drop on to my neighbour's premises.

In all these cases one piece of land 'serves' another. Hence the land on which the servitude is imposed is called the 'praedium serviens,' and the land which has the benefit of the servitude, the 'praedium dominans.' The two praedia must be 'vicina,' i. e. their situation must be such that one can be of use to the other. It is further required that the advantage which the praedium dominans derives from the praedium serviens shall arise from the permanent character of the latter (causa perpetua), and, conversely, that the benefits of the servitude shall exist, not only for this or that owner, but for every owner of the praedium dominans. It is in this sense that a praedial servitude is said to serve the dominant *land*. There can be no praedial servitude, where the object is merely to satisfy the wants of the present owner.

III. The person entitled to the servitude has a right to realize the condition of things actually corresponding to such servitude. In the case of a praedial servitude the limits of this right are determined by the requirements of the land to which it is annexed, as e. g. in the case of a right of pasture. On the other hand, the duty of the owner of

the res serviens is, on principle, confined to suffering the other party's act of user (pati, non facere); he is never bound to do any positive act in favour of the person entitled to the servitude (servitus in faciendo consistere nequit). §56.

pr. I. de serv. praed. (2, 3): Rusticorum praediorum jura sunt haec: iter, actus, via, aquaeductus. Iter est jus eundi, ambulandi hominis, non etiam jumentum agendi, vel vehiculum. Actus est jus agendi vel jumentum vel vehiculum. Itaque, qui iter habet, actum non habet; qui actum habet, et iter habet, eoque uti potest etiam sine jumento. Via est jus eundi et agendi et ambulandi; nam et iter et actum in se via continet. Aquaeductus est jus aquae ducendae per fundum alienum.

§ 1 eod.: Praediorum urbanorum sunt servitutes, quae aedificiis inhaerent, ideo urbanorum praediorum dictae, quoniam aedificia omnia urbana praedia appellantur, etsi in villa aedificata sunt. Item praediorum urbanorum servitutes sunt hae: ut vicinus onera vicini sustineat: ut in parietem ejus liceat vicino tignum immittere: ut stillicidium vel flumen recipiat quis in aedes suas vel in aream, vel non recipiat: et ne altius tollat quis aedes suas, ne luminibus vicini officiatur.

IV. Acquisition of Servitudes.

By the Roman civil law there is only one way in which a genuine servitude (ex jure Quiritium) can be validly created by agreement, viz. by in jure cessio, in other words, by a fictitious vindicatio of the servitude followed by a confession on the part of the fictitious defendant and an addictio of the praetor in favour of the fictitious plaintiff. Rural servitudes in Italy, however, were regarded as res mancipi, and could therefore be created not only by means of in jure cessio, but also by means of the juristic act which was employed for the purpose of acquiring *things*, to wit, mancipatio (sup. pp. 25, 33) [1].

[1] Another way of originating servitudes was the so-called 'deductio servitutis,' or reservation of a servitude by the owner on conveying his property by in jure cessio or mancipatio. Thus land could, for example, be mancipated, or (in the case of in jure cessio) vindicated (and accordingly 'addicted') 'deducto usufructu.' In such cases the servitude originated in the lex mancipationi, or in jure cessioni dicta (uti lingua nuncupassit, ita jus esto, p. 32), but was based, formally, not on an agreement to create a servitude, but on the

§ 56. According to the praetorian law no such formal juristic act was required. It was sufficient, if the servitude were actually granted by one party and exercised by the other (quasi traditio servitutis).

The forms of the civil law were not available for the creation of servitudes in provincial soil. Provincial soil admitted neither of genuine private ownership (sup. pp. 230, 240) nor of jura in re in the civil law sense of the word. But the praetorian form of creating servitudes was as applicable to provincial as it was to Italian soil. With a view to giving due legal expression, and, at the same time, solemnity to the grant of the servitude on the one hand, and the taking possession, in other words, the first exercise, of the servitude, on the other, it was usual, in the case of provincial soil, to conclude an agreement (pactio) in regard to the grant, and to provide, in regard to the exercise of the servitude, that the grantor of the servitude (i. e. the holder of the praedium serviens) should give the grantee a formal promise by stipulatio that, if he (the grantor) interfered with the servitude, he would pay a specified penalty. The effect of this formal undertaking to pay a specified penalty was to place the grantee in immediate possession of the servitude. That is to say, the fact that the party, who bound himself to allow the ser-

agreement to transfer ownership. It was not a case of two juristic acts being concluded, one for the transfer of ownership, the other for the creation of a servitude; there was but one juristic act, the act, namely, by which ownership was transferred with a reservation. Thus, the deductio servitutis was actually and formally a *deductio*, and not a *constitutio* servitutis. The person who became owner did not conclude first one transaction by which he acquired a right (viz. by the transfer of ownership), and then another transaction by which he encumbered his ownership (viz. by the creation of the servitude). The transaction concluded by him was entirely *acquisitive*, though it is true that since his ownership was encumbered, the effect of the right he acquired was curtailed. This is a matter of importance for those cases where the law allows a person to conclude transactions which benefit him, but prohibits him from concluding transactions which prejudice him (p. 141). A transfer with deductio to such a person would nevertheless operate to create a servitude valid not only as against others, but also as against him, although the same person could not validly effect a constitutio servitutis. It is quite different with the transfer of ownership by mere traditio. Traditio being an informal act, there is, according to the civil law, no lex traditioni dicta (l. 6 D. comm. praed. 8, 4, is an interpolation). Consequently, just as there is no fiducia by traditio (sup. p. 37, note 12), so there can be no deductio (scil. servitutis, pignoris) in a traditio. If a servitude or right of pledge is reserved in a traditio, such reservation amounts to a second agreement (operating to impose a burden), in addition to the agreement of tradito. This is the explanation of the decision in l. 1 § 4, l. 2 D. de reb. eor. (27, 9).

vitude, acquiesced in the other party's determination to exercise the servitude—a fact which found expression in his promise to pay the penalty—constituted, in itself, the quasi traditio servitutis. In the provinces, therefore, servitudes were created pactionibus et stipulationibus[2]. And this form of agreement for the creation of servitudes, which had been developed on the provincial estates, was the only form employed for the purpose in Justinian's law. In jure cessio and mancipatio of servitudes have disappeared. We have thus arrived substantially at the rule that a servitude can be created by a simple agreement—a rule which was 'received' as part of the common law in Germany § 56.

In addition to agreements, we have the following modes of acquiring servitudes :

(1) Legacy—the civil law requiring in this case that the direct and solemn form of legatum per vindicationem should be chosen (cp. § 102, I 1);

(2) Adjudicatio, in partition proceedings; as, for example, when the judge, for purposes of partition, awards the ownership to one party and a usufruct to the other, or when he, in case of an actual partition of the land, awards the respective owners mutual praedial servitudes. If the adjudicatio was to have quiritary effect, it was necessary, according to the civil law, that the partition suit should be carried through in the judicium legitimum (v. sup. p. 169);

(3) Usucapio. The old usucapio servitutis (within a period of one or two years) was, it is true, abolished by the lex Scribonia, but, in its place, the magisterial law extended the application of longi temporis possessio (sup. p. 240) to servitudes. Accordingly a servitude is acquired if exercised for ten years inter praesentes, or for twenty years inter absentes, nec vi nec clam nec precario.

V. Extinction of Servitudes.

A servitude is extinguished :

(1) by the death of the person entitled, where the servitude is personal. Capitis deminutio has the same effect as death, but in Justinian's law only capitis deminutio maxima and media (p. 125);

[2] Cp. Karlowa, *Das Rechtsgeschäft*, p. 223 ff.; Lenel, in Jhering's *Jahrbücher f. Dogmatik*, vol. xix. p. 183 ff.

§ 56. (2) by confusio, when the person entitled to the servitude acquires ownership in the thing, or when the owner acquires the right of servitude.

(3) by release to the owner of the servient thing;

(4) by bequest of the exemption from the servitude;

(5) by non usus, i. e. non-exercise of the right per longum tempus (ten years inter praesentes, twenty years inter absentes). Servitutes praediorum urbanorum however are not extinguished, unless the non usus on the part of the owner of the praedium dominans is accompanied by a so-called 'usucapio libertatis,' i. e. some positive alteration of the praedium serviens by which its freedom from the servitude is realized, e. g. by the raising of a house in spite of a servitus altius non tollendi. The personal servitudes of habitatio and operae servorum are not extinguished by non usus, nor, even in classical Roman law, by capitis deminutio minima. The law does not allow the purposes of maintenance which these servitudes are intended to serve to be frustrated by a temporary non-exercise of the right or a mere change of family relationship.

L. 6 D. de S. P. U. (8, 2) (GAJUS): Haec autem jura (praediorum urbanorum) similiter ut rusticorum quoque praediorum certo tempore non utendo pereunt; nisi quod haec dissimilitudo est, quod non omnino pereunt non utendo, sed ita, si vicinus simul libertatem usucapiat. Veluti si aedes tuae aedibus meis serviant, ne altius tollantur, ne luminibus mearum aedium officiatur, et ego per statutum tempus fenestras meas praefixas habuero vel obstruxero, ita demum jus meum amitto, si tu per hoc tempus aedes tuas altius sublatas habueris; alioquin, si nihil novi feceris, retineo servitutem. Item, si tigni immissi aedes tuae servitutem debent, et ego exemero tignum, ita demum amitto jus meum, si tu foramen, unde exemptum est tignum, obturaveris et per constitutum tempus ita habueris. Alioquin, si nihil novi feceris, integrum permanet.

VI. Protection of Servitudes.

Servitudes are protected by means of the actio confessoria in rem. The plaintiff in this action is bound to maintain and prove his title

to the servitude. The condemnation orders the disturber to pay damages, to recognize the servitude, and to discontinue all further acts of disturbance. The actio confessoria is thus the counterpart of the actio negatoria of the owner (p. 249). The actio negatoria is employed by the owner in order to stop an unwarranted attempt to exercise a servitude, as he would use it to stop any other disturbance of his ownership. The actio confessoria is employed by the person entitled to a servitude in order to assert his servitude against the owner or any third party, and to obtain, at the same time, an actual recognition of his right. § 56.

Corresponding to the actio Publiciana which is granted in lieu of a rei vindicatio, there is an actio Publiciana confessoria in rem which, like the actio Publiciana, is granted in two cases:

(1) where the servitude, though acquired a domino (i. e. from the owner of the praedium serviens), is acquired in a form which is insufficient by the civil law, viz. by mere pactio and quasi traditio instead of in jure cessio or mancipatio. This case would correspond to the case of bonitary ownership discussed above (p. 233);

(2) where the servitude is acquired bona fide a non domino and such acquisition is supplemented by quasi traditio, i. e. by actual possession obtained through the exercise of the servitude. In this case the plaintiff forbears from offering, or is unable to offer, any proof that the grantor of the servitude was really the owner of the praedium serviens. The analogue of this would be the case of usucapio possession, and the force of the actio Publiciana confessoria, just like that of the actio Publiciana in rem, as employed by the usucapio possessor, is merely relative, the action being only available against persons whose title is weaker (p. 250), and being, more particularly, liable to be repelled by the true owner of the praedium serviens by means of the exceptio dominii.

Particular servitudes are also protected by possessory remedies, i. e. by interdicts, granted, without proof of legal title, on the ground of the juristic possession of the servitude alone ('quasi possessio' or 'juris possessio'); that is to say, on the ground of the actual exercise of the servitude (corpus) coupled with the intention of acting as a person entitled to such servitude (animus). Possessory remedies of

§ 56. this kind are given to a usufructuary and a usuary, the possessory interdicts (pp. 253–255) being applied to their cases in the form of interdicta utilia. Further, a person who was entitled to a right of way was protected by the interdictum de itinere actuque privato, provided he was in the actual enjoyment of his servitude for thirty days in the preceding year nec vi nec clam nec precario ab adversario. A person who was entitled to convey water over his neighbour's land was protected by the interdictum de aqua, provided he exercised his right at least once within the last year of user bona fide nec vi nec clam nec precario. A person entitled to draw water on his neighbour's land was protected by the interdictum de fonte under the same conditions as were required in the interdictum de aqua.

§ 57. *Emphyteusis.*

§ 57. Emphyteusis is the long lease of Roman law. It originated, in the first instance, in a system adopted by the governing bodies of towns under which the town-communities let out land, more especially rural estates (praedia rustica), for an indefinite term of years, subject to the payment of an annual rent (vectigal). Such land was called 'ager vectigalis' (though there were also *aedes* vectigales; v. Degenkolb, *Platzrecht*, &c., pp. 51, 84, at the end). This system was then extended to the demesnes of the emperor, whenever it was desired to have uncultivated lands made arable (emphyteusis)[1]. The doubts which existed among the Roman jurists as to

[1] Emphyteusis (literally 'in-planting') is thus originally the name applied to waste land belonging to the emperor, which was let out on perpetual leases for the purpose of securing its cultivation. It was opposed, on the one hand, to the 'ager vectigalis,' i. e. the common land belonging to *towns* which was let out on perpetual leases and consisted, as a rule, of plots already in a state of cultivation. On the other hand, it was opposed to the so-called 'conductio perpetua,' i. e. the letting out, on perpetual leases, of imperial estates which were already in a state of cultivation—a practice which was commenced towards the close of the fourth century and was subsequently extended to the common lands belonging to towns. From the time of Constantine the ager vectigalis disappears, owing (it would seem) to the extensive process of confiscation to which the property owned by the communities was subjected, for the benefit partly of the State, partly of the Church. When part of these lands was subsequently restored to the communities (e. g. by Julian, and afterwards by Theodosius II), they were administered after the manner of the imperial de-

whether emphyteusis was a sale, or merely a hire of the land, were settled by an enactment of the Emperor Zeno to the effect that the agreement between the emphyteuta and the dominus was a special kind of juristic act, viz. the 'contractus emphyteuticarius,' and that the legal relationship created by emphyteusis was sui generis, and was governed by rules of its own. § 57.

The rights of an emphyteuta are as follows:

Though not the owner of the land, he is nevertheless entitled to exercise all the rights of an owner, so that, practically, he stands to the land, as long as his right lasts, in the same relation as though he were actually the owner. He has the full right to take, not only the fruits, but all the produce of the land, and consequently also the right—which the usufructuary, and the mere lessee for a short term of years, has not—to make improvements and change the mode of cultivation. Like the owner he acquires the fruits by mere separation; he need not take actual possession of them (perceptio). He is protected by the same remedies as the owner, viz. the rei vindicatio (utilis), the actio negatoria (utilis), and, when the fundus emphyteuticarius is entitled to a praedial servitude, the actio confessoria (utilis). Moreover, if he is in the actual enjoyment of his right, he can, like the owner, claim protection for his possession by means of the possessory interdicts (sup. pp. 253–255). In point of actual strength, his possession is equal to that of the owner. It is his intention, without any qualification, to hold the thing in his own interest, to be—economically speaking—the owner himself (animus domini).

On the other hand, the duties of the emphyteuta are as follows:

(1) he must pay his annual rent (vectigal, canon); (2) he must not

mesnes (emphyteusis, conductio perpetua), and, at the same time, the word emphyteusis was applied, as a general term, to perpetual leases of any kind. The rubric of title 6, 3 in the Digest: 'si ager vectigalis *idest emphyteuticarius* petatur' (cp. l. 15 § 1 D. 2, 8; and Lenel, *Edictum*, p. 146), shows clearly that in speaking of 'ager emphyteuticarius,' the compilers intended the term to cover any land let out on a perpetual lease. The praetor had already granted the possessors of agri vectigales a real action (utilis rei vindicatio); the same remedy was subsequently extended to every holder of a perpetual lease as such.—On the history of emphyteusis cp. Brunner, *ZS. der Sav. St.*, vol. v (german. Abt.), p. 76 ff.

§ 57. deteriorate the property; (3) he must give his landlord notice of his intention to dispose of his rights as perpetual lessee so that the landlord may, if he choose, exercise his right of pre-emption (jus protimiseos). If the emphyteuta fail in any of these duties, e. g. if his rent be three years in arrear, the landlord (dominus emphyteuseos) may deprive him of his rights as perpetual lessee (right of eviction).

As compared with servitudes, there are two points which distinguish emphyteusis: (1) the emphyteuta stands, not only economically, but, in the main, also legally in the position of an owner; emphyteusis therefore confers a considerably wider range of rights than the servitudes; it is intended to take the place of ownership; (2) emphyteusis is heritable and alienable.

As distinguished from a lessee for a short term of years, who has merely an obligatory right against the lessor, the emphyteuta has a real right in his land available against everybody.

> § 3 I. de loc. et conduct. (3, 24): Adeo autem familiaritatem aliquam inter se habere videntur emptio et venditio, item locatio et conductio, ut in quibusdam causis quaeri soleat, utrum emptio et venditio contrahatur, an locatio et conductio? Ut ecce de praediis, quae perpetuo quibusdam fruenda traduntur, id est, ut quamdiu pensio sive reditus pro his domino praestetur, neque ipsi conductori, neque heredi ejus cuive conductor heresve ejus id praedium vendiderit, aut donaverit, aut dotis nomine dederit, aliove quo modo alienaverit, auferre liceat. Sed talis contractus, quia inter veteres dubitabatur, et a quibusdam locatio, a quibusdam venditio existimabatur, lex Zenoniana lata est, quae emphyteuseos contractui propriam statuit naturam, neque ad locationem, neque ad venditionem inclinantem, sed suis pactionibus fulciendam.

§ 58. *Superficies.*

§ 58. Superficies stands to houses in the same relation as emphyteusis to agricultural land. Superficies, in Roman law, is a perpetual

lease of building land, subject to the payment of annual rent (solarium). On this land the superficiary erects a house. He builds it with his own materials. By the rules of accession, therefore, the ownership of the house vests in the owner of the soil (superficies solo cedit). A superficiary, however, has a real right, for himself and his heirs, to live in the house and exercise the rights of an owner therein for the specified term of years (say, ninety-nine years) or for ever, as the case may be. Hence the legal position of the superficiary is the same as that of the emphyteuta. Like the emphyteuta he has the same remedies as an owner (in the form of actiones utiles), and his possession is expressly protected by the interdictum de superficie. He is entitled to execute repairs and alterations in the house, provided he does not deteriorate the property. He has the control of the house, and has therefore, together with the essential rights of an owner, the juristic possession of the house (corpus and animus) in the same way as though he were owner thereof[1]. § 58.

The remarks made above (at the end of § 57) in reference to emphyteusis are equally applicable to the difference between superficies and servitudes, on the one hand, and letting and hiring, on the other hand.

The legal recognition of superficies is based on the praetorian law.

L. 1 pr. D. de sup. (43, 18): Ait praetor: UTI EX LEGE LOCATIONIS SIVE CONDUCTIONIS SUPERFICIE, QUA DE AGITUR, NEC VI NEC CLAM NEC PRECARIO ALTER AB ALTERO FRUEMINI, QUOMINUS FRUAMINI, VIM FIERI VETO. SI QUA ALIA ACTIO DE SUPERFICIE POSTULABITUR, CAUSA COGNITA DABO.

§ 3 eod.: Quod ait praetor: SI ACTIO DE SUPERFICIE POSTULABITUR, CAUSA COGNITA DABO, sic intellegendum est, ut, si ad tempus quis superficiem conduxerit, negetur ei in rem actio. Et sane causa cognita ei, qui non ad modicum tempus conduxit superficiem, in rem actio competet.

[1] Degenkolb, *Platzrecht u. Miete* (1867).

§ 59. *Pledge.*

§ 59. A right of pledge is a real right which enables the person entitled to secure payment of a claim through the medium of a thing.

I. History of Pledges.

In early Roman law, a right of pledge, in the proper sense of the term, i. e. in the sense as we have just defined it, was unknown. It is true there were certain juristic acts the economic result of which was the creation of a pledge, in other words, the securing of a claim by means of a thing. But there was no juristic act whose formal object it was to create a right of pledge over a thing.

1. Fiducia.

If a person wished to obtain credit by giving his creditor security for his claim, he might effect his purpose by mancipating a thing to the creditor, i. e. by conveying to him, by an imaginaria venditio nummo uno (sup. pp. 33, 34) the ownership of the thing, subject, however, to an understanding that as soon as he (the debtor) discharged his liability, the creditor should reconvey the thing to him. The mancipatio was a mancipatio on trust, it was the 'fiducia' which we have already described (p. 34). In this transaction the position of the creditor was safe enough. He was the owner of the thing, and was therefore, in strict law, entitled to deal with it as he liked. He might, for instance, sell it in satisfaction of his claim, if the debtor defaulted. But, on the other hand, the position of the debtor was unsatisfactory. Even though he duly paid his debt, he could never be sure of recovering the property he had parted with as a security for his debt. The creditor might, meanwhile, have alienated it, given it away, sold it, or exchanged it. True, the creditor was, in such cases, bound to compensate him, but as regards the third party who had acquired the property, the debtor had no remedy, for the third party was full and lawful owner of the thing. Thus the debtor could only obtain compensation, but not the thing itself. What he wanted was a real right to claim restoration of his property, which should be available against any third party into whose posses-

sion his property might come [1]. But the drawback of the transaction, as regards the debtor, was precisely this that he had parted with the ownership which would have given him the real right he wanted. It was for this reason that a second method of giving creditors security for their claims came into use, to wit, pignus. § 59.

2. Pignus.

It was open to the debtor to transfer the thing, which was intended to serve as the creditor's security, by mere traditio in such a way as to confer on the creditor, not the ownership of the thing (not even the bonitary ownership), but simply the actual control, the *complete* actual control (the juristic possession) of the thing. Such a relationship was called 'pignus.' Here the debtor's position was satisfactory enough. He retained his ownership and, with it, a real right to recover his property from any one who obtained possession of it. As soon as he paid his debt, no one had a right to withhold the thing from him. But the position of the creditor was most unsatisfactory. True, he had actual possession of the thing, and the praetor protected his possession by means of the possessory interdicts. But he had no real right in the thing, and could not, therefore, make use of the ordinary in rem actio against third parties. And, worst of all, he had no right to dispose of the thing with a view to satisfying his claim. Even though his debtor were in default, he could not sell the thing and recoup himself out of the proceeds. And if the debtor preferred leaving the thing with the creditor to paying his debt, the pignus was of no use to the creditor at all [2]. The problem therefore was to find a transaction under which, though the debtor retained the ownership of the thing, and, with it, a real right to recover it from third parties, the creditor should nevertheless acquire *a right in the thing*, the

[1] The possibility of usureceptio (p. 241, n. 1), which presupposed possession on the part of the debtor, afforded but scant protection.

[2] Hence it was sometimes agreed that, in default of payment, the ownership in the pignus should (by way of penalty) pass to the creditor ('lex commissoria.') The so-called 'pactum venditionis,' on the other hand (i.e. the agreement by which the creditor was given a right of sale for the purpose of satisfying his claim), was not introduced till later (viz. under the empire). A. Pernice, *ZS. d. Sav. St.* vol. v. p. 134. A different view is taken by M. Voigt, *Das pignus der Römer*, in the *Berichte d. königl. sächsischen Gesellschaft d. Wissensch.* 1888, pp. 273, 274.

§ 59. right, namely, if necessity arose, to realize its value for the purpose of satisfying his claim, in a word, a right of pledge, in the true sense of the term. This problem was solved with the aid of the praetorian edict.

3. Hypotheca.

The debtor could enter into an agreement with the creditor (without either mancipatio or traditio) that certain things belonging to him (the debtor) should serve the creditor as a 'hypotheca,' i. e. should serve as a means of satisfying the creditor's claim, if he (the debtor) failed to pay. Such a relation was called 'hypotheca.' Both the name and the nature of hypotheca were derived from Greek law. Under the old Roman law such an agreement was totally void. The praetor, however, made it valid—in the first instance, in cases where tenant-farmers had 'hypothecated' their farming-stock (invecta et illata) to their landlords. In such circumstances the praetor enabled the creditor to obtain possession of the things pledged by granting him the so-called 'interdictum Salvianum,' as well as an ordinary legal remedy called the 'actio Serviana.' The same protection was then extended to any person to whom property had been hypothecated by another ('actio quasi Serviana' or 'actio in rem hypothecaria'). Thus, according to the praetorian law, a hypotheca gave the creditor, in the first place, a real right of action, which enabled him, on non-payment of the debt, to obtain possession of the thing hypothecated; and, in the second place, it gave him a right of sale, i. e. a right to realize the value of the thing for the purpose of satisfying his claim. Thus the creditor had all the rights he required, and, conversely, the interests of the debtor were protected by the fact that he retained his ownership and, with it, the real right to recover his property from any third party into whose hands it might come.

A genuine right of pledge had thus been developed. The hypothecary agreement was now an agreement whose object it was, formally as well as practically, to create a right of disposing of a thing not one's own, to create, in a word, a right of pledge. Of course an agreement of hypotheca may be accompanied by the traditio of the thing into the possession of the creditor ('pignus,'

pledge), but such a traditio is not necessary. What *is* essential for giving rise to a right of pledge, is not the transfer of possession as such, but merely the agreement to hypothecate (ut res hypothecae sit). § 59.

L. 9 § 2 D. de pign. act. (13, 7) (Ulpian.): Proprie pignus dicimus, quod ad creditorem transit, hypothecam, cum non transit, nec possessio, ad creditorem.

L. 5 § 1 D. de pign. (20, 1) (Marcian.): Inter pignus autem et hypothecam tantum nominis sonus differt.

II. The Rules of Law concerning Pledges.

A right of pledge originates:

(1) in ordinary cases, either in an agreement (pignus conventionale), or in a testamentary disposition (pignus testamentarium);

(2) in extraordinary cases, either in a statute (like the hypotheca in favour of the claims of the fiscus over the entire estate of persons indebted to it, or the hypotheca in favour of the claims of persons letting houses over the invecta et illata, i. e. the furniture, of their tenants: so-called pignus tacitum or legale), or in the seizure of a debtor's property in the course of a judicial execution (pignus judiciale).

A case of pledge (pignus) of the old type, where the creditor obtains actual control, or mere detention, of a thing by way of security for his claim, without any right of sale or real right of action, occurs, when the praetor, with a view to giving a creditor provisional security for his claims, grants him 'missio in possessionem' against such of the debtor's property as he (the creditor) has an interest in (pignus praetorium).

A right of pledge entitles the pledgee: (1) to have possession of the thing; (2) to realize the value of the thing for the purpose of satisfying his claim (which he does, as a rule, by selling it). As to the right of possession (which is protected either by a petitory action, viz. the actio in rem hypothecaria, or by possessory remedies, viz. the possessory interdicts), where the thing is actually delivered to the pledgee in pledge, it arises at once on the delivery; in cases of a mere hypotheca, however, the right does not arise until it becomes

§ 59. necessary for the creditor to assert his right to realize the value of the thing. As to this latter right (the right of sale), it never arises till the claim is due, and the debtor, in spite of notice, or judgment, remains in default. Having carried out the sale, the creditor pays himself out of the proceeds. If the amount realized is in excess of his claim, he must restore such surplus ('hyperocha') to the debtor (§ 66). The so-called 'lex commissoria' (foreclosure clause), by which it was agreed that in case of non-payment the pledgee should become ipso jure owner (v. note 2), was declared void by a law of the Emperor Constantine. In case of necessity, however, where a sale was impracticable, the court could, on the petition of the pledgee, adjudge him the ownership of the thing at a certain valuation ('impetratio dominii'). The hyperocha in such a case would be the excess of the assessed value over the amount of the debt secured by the pledge. 'Antichresis' is the name given to an arrangement between pledgor and pledgee by which the pledgee not only obtains possession together with a right of sale, but also the right to take all the fruits and profits yielded by the thing, such fruits and profits to be accepted in lieu of interest.

The owner of the pledge may transfer his ownership to a third party, but the pledge-right, already granted to the creditor, holds of course equally good against the new owner. In the same way the owner may pledge the same thing to several persons in succession. Successive rights of pledge of this kind may also be created by statute. In such cases no pledgee is entitled to exercise his right of pledge till the prior pledgee has been satisfied. Priority is determined, on principle, by reference to the time when the several rights were respectively created (prior tempore potior est jure)—a principle which was not however adhered to by Roman law in cases of so-called 'privileged' rights of pledge, such as existed, for instance, in favour of the claims of the fiscus for public dues.

A right of pledge is extinguished, as soon as the debt is paid, or the creditor obtains satisfaction by realizing the value of the pledge (by sale). But it is a rule that till the entire debt has been discharged, the whole pledge remains liable for the unpaid balance (pignoris causa est individua). If a prior pledgee exercises his right

of sale, subsequent rights of pledge are thereby destroyed. The object of these rights having been done away with, the pledgees are, in lieu thereof, entitled to the hyperocha, which the preceding pledgee is accordingly bound to hand over. § 59.

L. 1 C. si antiquior creditor (8, 20) (ALEXANDER): Si vendidit is qui ante pignus accepit, persecutio tibi hypothecaria superesse non potest.

CHAPTER III.

The Law of Obligations.

I. The Conception and Contents of an Obligation.

§ 60. *The Conception of an Obligation (Obligatory Right).*

§ 60. An obligatory right, within the meaning of Roman private law of the classical period, is a right to require another person to do some act which is reducible to a money value. It is invariably directed against a determinate person, viz. the debitor, or debtor. Ownership may be asserted against all the world, but an obligation can only be asserted against, say, the vendor, if it arises from a sale, or the person who lets, if it arises from a contract of letting and hiring, and so forth. Obligatory rights are rights which only operate relatively, viz. as against the person of the debtor.

The obligation which rests on the debtor does not imply subordination. This is what constitutes the difference between obligations, on the one hand, and family rights and the rights of public officials, on the other. Family rights and public rights produce subordination. An obligation leaves the debtor free as against the creditor. Both the parties are equal. The creditor cannot force the debtor, by any private act, to fulfil his obligation. Such force can only be applied by the state, at the suit of the creditor.

Inasmuch as an obligation neither implies, nor is intended to imply, subordination, it is confined to acts which are reducible to a money value. Obligations are not designed to create any general control over all the acts of the debtor. A debtor can, in the last

resort, rid himself of every obligation by sacrificing a corresponding portion of his property for the purpose of indemnifying his adversary. An obligation means a deduction, not from a man's liberty, but only from his property. § 60.

L. 3 D. de O. et A. (44, 7) (Paulus): Obligationum substantia non in eo consistit, ut aliquod corpus nostrum, aut servitutem nostram faciat, sed ut alium nobis adstringat ad dandum aliquid vel faciendum vel praestandum.

L. 9 § 2 D. de statu lib. (40, 7) (Ulpian.): Ea enim in obligatione consistere, quae pecunia lui praestarique possunt.

§ 61. *Plurality of Debtors and Creditors.*

Just as several persons may be co-owners in respect of the same thing (p. 228), so several persons may be co-debtors or co-creditors in respect of the same obligation ('correal obligation'). Co-debtors are called 'plures rei promittendi' (passive correal obligation). Co-creditors are called 'plures rei stipulandi' (active correal obligation). And just as co-ownership means the common ownership of several persons in the same undivided thing, so correal obligation means the common liability or right of several persons in respect of the same undivided act. § 61.

Suretyship (fidejussio, § 67 I, 3) is an example of a correal obligation. The surety and the principal debtor are both liable for the whole of the same debt. Besides suretyship, the most important source of correal obligations are joint agreements in which the joint liability or right of all is expressly provided for[1]. For example:

[1] A joint agreement as such (e. g. the joint hire of a room, a joint loan, &c.) only operates to make each of the joint parties liable, or entitled, pro parte. The result, therefore, is the creation of a series of rights or liabilities, each of which exists in respect of part of the obligation only, and has nothing in common with the others. A joint agreement does not give rise to a correal obligation, unless it is, at the same time, expressly provided that all the joint parties shall be liable for, or entitled to, the whole. The usual means of creating a correal obligation among the Romans was a joint stipulation by two or more persons in respect of the same act which was the object of the obligation. Cp. the passage cited inf. p. 284, pr. I. de duobus reis 3, 16. It is for this reason that correal debtors were called duo pluresve rei promittendi, and correal creditors duo pluresve rei stipulandi.

§ 61. A and B jointly hire a room, or jointly accept a loan or a commodatum, &c., and agree, at the same time, that they shall both be liable for the whole debt (i. e. the whole rent, the whole loan, the restoration of the whole commodatum, &c.). The result is a passive correal obligation. Or again: A and B being co-owners of a house, let their house jointly (or give a loan jointly, &c.), and agree, at the same time, that each of them shall be entitled to recover the whole of what is due under the obligation. The result is an active correal obligation [2]. In all these cases the material requirements for the production of an obligation in respect of the whole occur but once. Nevertheless, the effect of the agreement, or the suretyship, is to create, formally speaking, a plurality of liabilities (or rights), a multiplication of the obligation, the same obligation being, so to speak, simultaneously produced in a number of copies. The object here is not to enable the creditor to recover the whole of the same debt several times over, but merely, on the one hand, to render his position more secure, by making several debtors liable to him for the same debt, and, on the other, to facilitate the recovery of the debt by legal proceedings, a single action being sufficient for the purpose [3]. A correal obligation is a plurality of obligations, where there is, economically speaking, only one obligation. And a correal

[2] The following are further instances of correal obligation. Argentarii socii (i. e. the ostensible partners in a banking business) are correal debtors or creditors in respect of contracts concluded by each individual socius. Co-owners of a slave, or of an animal that has done damage, are correal debtors in respect of the noxal action, or actio de pauperie (§ 73, 5). A correal obligation also arises where a testator charges a legacy in the alternative (e. g. heres meus aut Titio aut Maevio decem dato, or: Lucius heres meus aut Maevius heres meus Sejo decem dato). Cp. e. g. l. 8 § 1 D. de legat. I (30). The implication here is that the *alternative* legacy shall be treated as *joint*, that 'aut' therefore shall be taken = et, as is expressly stated in l. 9, pr. D. de duob. reis 45, 2, and in l. 4 C. de verb. sign. 6, 38. Correality does not mean an *alternative* right, or liability, but a *joint* right, or liability. This fact, if borne in mind, may serve perhaps to explain the two passages from the authorities which we have just quoted and whose correctness has often been strongly impugned.—The idea of a correal obligation seems to have originated within the domain of the jus sacrum. The earliest correi are the convoventes, conjurantes, conspondentes (v. Leist, *Gräco-italische RG.* p. 231), persons who have jointly pledged themselves to the gods to fulfil the same vow.

[3] In the case of a passive correal obligation the primary object in view is always the security of the creditor; in the case of an active correal obligation, it is the increased facility of legal redress. Every correal creditor (e. g. an argentarius socius) may sue for the whole amount without having to show that his partners have given him authority to do so.

obligation is *one*, not only economically, but also legally, in virtue § 61.
namely of the fact that, legally speaking, the plurality of obligations constitutes one common obligation of the several parties concerned. As in joint-ownership the same thing has several owners, so in the case of a joint obligatory right, or liability, the same obligation has several creditors or debtors. In joint ownership, however, the principle applied by the Romans is that of proportional shares, i. e. each person sharing the ownership can only assert such ownership to the extent of his proportional share; whereas in the case of several persons sharing an obligatory right or liability, the principle of correality applies, i. e. each of the persons sharing the obligation is entitled or bound in respect of the whole. In both cases the underlying idea is that of a community of right or liability[4]. Hence the Romans describe a correal obligation as 'una obligatio' (communis obligatio), and the parties to a correal obligation as persons who 'unius loco habentur' (ejusdem obligationis participes, ejusdem obligationis socii). A correal obligation means a plurality of obligations based on a community of obligation.

From a correal obligation we have to distinguish a solidary obligation. A solidary obligation means the *separate* liability of several persons in respect of one and the same object. The commonest example of a solidary obligation is the case of a joint delict, as when two or more persons, acting jointly, do damage to

[4] The principle of proportional shares is not, by any means, the only principle applicable to cases of common rights and duties. The 'correal' principle and the 'collective' principle ('Gesamthandprincip') are equally applicable. The correal principle means that each of the sharers is entitled, or bound, to represent the whole legal relationship in his own person alone. The collective principle, on the other hand, means that the rights or duties in question are only exercisable by, or demandable from, all the sharers collectively. In correality each correus is materially (though not formally) a representative of the other correi (unius loco habentur), and the correal principle, in its turn, admits of various modifications, the position of the separate correi not being always exactly the same. Thus it is said in the German law concerning the common property of husband and wife that, as regards the movable common property, husband and wife are each empowered to dispose of it by their own separate act, the husband however absolutely, the wife only so far as such disposition is necessary for the management of kitchen and cellar (i. e. correality in a modified form); as regards the immovable common property, the collective principle applies, i. e. the husband and wife must concur in disposing of such land as belongs to them both. Cp. A. Heusler, *Institutionen des deutschen Privatrechts*, vol. i. p. 224.

§ 61. property or commit a theft [5]. So far as the obligation creates a duty to pay damages, it is solidary. Each co-delinquent is bound to make good the whole of the same damage [6]. The material conditions for the production of an obligation occur several times over, and are complete as against each of the co-delinquents, because each of them has caused the entire damage. The plurality of the obligations corresponds to the plurality of the material grounds of obligation. The facts supply a complete basis for the liability of each of the parties in respect of the whole. Hence though the object is one, the obligations are independent and separate. A solidary obligation means a plurality of obligations in respect of one and the same object without any community of obligation [7].

The difference between a correal and a solidary obligation receives its best practical illustration from the rules concerning the extinction of the respective relations. The extinction of a solidary obligation as against all the parties concerned can only be brought about by payment, or something equivalent to payment; in other words, by the material satisfaction of the creditor. The object of the obligation being one, the performance of this object by one solidary debtor will necessarily release the others. If A has been compensated by

[5] And, generally speaking, where several persons are jointly answerable for a wrong done, the obligation is solidary. Thus where there are several guardians for the same guardianship, or several officials for the administration of the same property, they are solidarily liable for all damage caused by the act or default of any one of them, because each participates in the wrong done by the other. These are all cases of passive solidary obligation. But there are also cases of active solidary obligation. Cp. Jhering, in his *Jahrbücher f. Dogmatik*, vol. xxiv. p. 129 ff.

[6] So far, however, as the obligation ex delicto creates a duty to pay a penalty (as in the case of furtum to pay duplum or quadruplum, § 72), the result is not a solidary obligation, but a number of independent obligations, the object of which, though equal in amount (e.g. duplum), is *not identical*. Hence each joint perpetrator of a theft has to pay his penalty in full (to ensure the punishment of all), whereas the payment of damages by one of the parties liable releases the rest.

[7] In the text I have adopted the argument set out in Unger's able and ingenious essay on Passive Correality and Solidarity in Jhering's *Jahrbücher für Dogmatik*, vol. xxii. (1884), p. 207 ff. His view is opposed by Hölder (*Zwei Abhandlungen aus dem römischen Rechte*, Festschrift für Scheurl, 1884, p. 31 ff.; and see Unger's reply in Jhering's *Jahrbücher*, vol. xxiii., p. 106 ff.), and also by Waldner, *Die correale Solidarität* (1885). According to Hölder a correal obligation means a plurality of obligations which are regarded, by a fiction, as being one and identical, i.e. the several debtors, or creditors, are treated by the law as identical with one another in respect of this obligation.

one person for the damage he sustained, he cannot claim damages over again from the other persons, for the simple reason that there is no longer any damage to compensate him for. A correal obligation, however, is extinguished as against all the parties concerned, not only by payment, but by any ground of extinction whatever (even though it be a purely formal one), which affects the *existence* of the common obligation, as, for example, by acceptilatio or litis contestatio. If a surety has been released from his liability by acceptilatio, i. e. by a formal contract of release (inf. § 76), the principal debtor is thereby released from all further claims. If one of two correal creditors under a loan takes an action in respect of such loan, his litis contestatio (sup. pp. 208, 209) operates to consume not only his own, but also the other correal creditor's right of action, and if judgment is given against him, such judgment entitles the successful defendant to meet the other correus with an exceptio rei judicatae. It follows from the community of the obligation that the principle of correality, i. e. the principle of representation, is as applicable to the extinction of the obligation as it is to the rights and duties accruing under it, i. e. every party to a correal obligation represents the whole obligation; every party to a solidary obligation only represents his own obligation. § 61.

In the course of the development of Roman law the principle of correality was broken in upon. Thus Hadrian gave several co-sureties the exceptio divisionis, i. e. the right to be sued for a proportional share only (inf. § 67 I. 3). Justinian extended this right (the so-called 'beneficium divisionis') by his 99th novel to persons who, though correally liable by agreement, are nevertheless, materially speaking, only interested in part of the object of the obligation, as, for example, when they hire a room jointly or accept a loan jointly. The effect was to substitute, to this extent, the principle of proportional shares (as in joint ownership) in place of the principle of correality. Accordingly by l. 28 C. de fidejussoribus (8, 40) Justinian abolished the consuming force of litis contestatio as regards passive correal obligation, in other words, he provided in effect that an action taken against one correal debtor should not henceforth operate to consume the right of action against the other. Nevertheless the

§ 61. rule that, both in active and passive correality, when judgment had been obtained in an action with one correus, the exceptio rei judicatae could be pleaded for, or against, the other correi, remained unaltered, and it is this rule that constitutes, to this day, the practical distinction between a correal and a solidary obligation. A correal obligation still means a number of obligations which are bound up into one, a solidary obligation a number of independent obligations existing concurrently. In every correal obligation the liability of one correus is exposed to the effects produced by the acts of the others. Thus if one correal creditor waives his claim against the debtor, or unsuccessfully sues him, his co-creditor loses his right. A correal debtor is moreover responsible for culpa imputable to his co-debtor. On the other hand, a solidary obligation is not affected by the acts of others. Accordingly, the liability of one solidary debtor is not affected, say, by an action taken against the other. It is only where the *object* of the obligation disappears (viz. by payment, by material satisfaction) that the solidary obligation ceases, in virtue of its own contents, to exist. Both in Justinian's law and in modern law the rule holds good that correal obligation means joint liability, solidary obligation separate liability [8].

L. 3 § 1 D. de duob. reis (45, 2) (ULPIAN.): Ubi duo rei facti sunt, potest vel ab uno eorum solidum peti; hoc est enim duorum reorum, ut unusquisque eorum in solidum sit obligatus, possitque ab alterutro peti; et partes autem a singulis peti posse, nequaquam dubium est; quemadmodum et a reo et fidejussore petere possumus. Utique enim, cum una sit obligatio, una et summa est; ut, sive unus solvat, omnes liberentur, sive solvatur uni, ab altero liberatio contingat.

pr. I. de duob. reis (3, 16): Et stipulandi et promittendi duo pluresve rei fieri possunt. Stipulandi ita, si post omnium interrogationem promissor respondeat SPONDEO, ut puta cum duobus separatim stipulantibus ita promissor respondeat: UTRIQUE VESTRUM DARE SPONDEO. Nam si prius Titio spoponderit, deinde alio interrogante spondeat, alia atque alia erit obligatio nec creduntur duo rei stipulandi esse.

[8] On the above subject v. Jhering, *loc. cit.* (sup. n. 5), pp. 185, 186.

Duo pluresve rei promittendi ita fiunt: MAEVI, QUINQUE AUREOS DARE SPONDES? SEI, EOSDEM QUINQUE AUREOS DARE SPONDES? respondeant singuli separatim SPONDEO. § 61.

§ 62. *The Contents of an Obligation.*

§ 62. Every obligation has for its object either dare, i. e. the procuring of ownership, or of a civil law jus in re (a servitude), or facere, i. e. any other act. In the former case the civil law is able to determine the value of the obligation, which is co-extensive with the value of the object of the act (i. e. the thing or servitude). Hence an obligatio dandi is called a certa obligatio, because its value is objectively ascertained, is perceptible, and is strictly defined. But where the object of the obligation is some other act—e. g. the rendering of a service, the building of a house, the restoration of a thing which already belongs to me, or the procuring of a jus in re not recognized by the civil law (say, a superficies)—in all these cases the civil law has no means of determining the value of the obligation, which is not expressed in the value of the object of the act. Hence an obligatio faciendi is called an incerta obligatio, because its value is not ascertained, not perceptible, not strictly defined by the contents of the agreement itself.

An obligation to procure ownership in a thing which is only determined in the alternative or generically, is not a direct obligation to procure ownership, but an obligation, in the first instance, to select. Hence it is not an obligatio dandi, but an obligatio faciendi, an incerta obligatio. There is no definite object representing and embodying the value of the obligation. But an obligation to procure ownership in a certain quantity of res fungibiles, e. g. in a certain amount of wheat, is an obligatio dandi and an obligatio certa. The value of such an act is determinable by reference to every such amount of the thing in question, and the procuring of res fungibiles involves, not a selecting between things which are different, but a counting, or weighing, or measuring, of things which are treated without distinction as equal (tantundem ejusdem generis est idem, cp. sup. p. 228). In such a case the *direct* object of the obligation is to procure ownership.

§ 63. *Negotia Stricti Juris and Negotia Bonae Fidei.*

§ 63. The effect of some contracts is to produce a liability which is precisely determined and accurately defined. The effect of others is to produce a liability which is not precisely determined nor accurately defined and which is (at the outset at least) indefinable. Contracts of the former kind are called negotia stricti juris, contracts of the latter kind negotia bonae fidei.

Negotia stricti juris are contracts which bind the parties to the exact performance of that which they promised, for example, the Roman stipulatio (which may be compared to a modern bill of exchange, inf. § 67). Negotia stricti juris are interpreted literally. Nothing is due that has not been promised. The contents of the obligation to which they give rise are a matter of calculation and can be accurately determined. If a person has promised by a negotium stricti juris to dare certam rem, the resulting obligatio is certa in the full sense of the term. Nothing more is due than what has been promised.

Negotia bonae fidei, on the other hand, are contracts in which the parties are bound to perform, not what they promised, but rather whatever can be fairly and reasonably required according to the circumstances of the case—which may be either more, or less, than what was actually promised. The resulting liability is not a matter of calculation, and will be variously determined according to the particular circumstances. The obligatio is always incerta, even where there is an express promise, the direct object of which is to dare certam rem, for example, in an exchange. The nature of the parties' liability is expressed in the words: *quidquid* dare facere oportet ex bona fide (cp. p. 187).

Bonae fidei negotia, such as sale, exchange, hire, partnership, always operate to impose certain duties on the parties, whether such duties were expressly promised or not.

1. The parties must exercise care, 'diligentia.' The degree of care required is uniformly omnis (or summa) diligentia, or, as it is often called, diligentia diligentis (sometimes termed diligentissimi) patrisfamilias. In other words, they are bound to behave in the

way any careful man would behave under the circumstances. If either party fall short of the standard required (so-called culpa levis), he must indemnify the other for any damage resulting from his act or default. It is only in exceptional cases that the liability of the parties is restricted to deliberate and malicious damage (dolus), or to carelessness so gross as necessarily to imply an intention (culpa lata). The separate cases of this kind will be specified hereafter in discussing the separate contracts. § 63.

2. The parties are liable in full damages for delay in performing, for inadequate performance, or for non-performance. The debtor must compensate the creditor for 'quanti ea res est,' i. e. for all damage which the creditor has sustained as a direct consequence of the debtor's wilful or negligent non-performance or misperformance (the creditor's 'interesse'). In case of delay (mora) the debtor must pay interest on account of such delay. The rule is different in regard to negotia stricti juris (sup. p. 192).

The debtor however is never liable for accident (casus a nemine praestatur). Accident, within the meaning of the law of contract, means any event which takes place without the debtor's act or default. Thus an accident may render performance, on his part, impossible (if, for example, the merchandise he agreed to procure is destroyed), and in that case he is discharged. Only a debtor who is in mora solvendi is, by way of punishment, made liable even for casus: in other words, casus does not operate to discharge him, but leaves him liable to compensate the creditor to the extent of his (the creditor's) interesse.

II. The Modes in which Obligations arise.

§ 64. *Contracts and Delicts.*

An obligation arises either by a declaration of consensus (ex contractu), i. e. in conformity with the will of the debtor, or by an act in contravention of the law (ex delicto), i. e. contrary to the will of the debtor. § 64.

Besides obligationes ex contractu, we have the cases of so-called 'obligationes quasi ex contractu,' which arise from facts bearing

§ 64. a certain resemblance to contracts. Besides obligationes ex delicto we have the cases of so-called 'obligationes quasi ex delicto,' which arise from facts bearing a certain resemblance to delicts.

A. Contractual Obligations.

§ 65. *Introduction.*

§ 65. Roman law adhered all along to the principle that not every promise which is intended to create an obligation is legally valid and actionable; but that, in order to make such promise valid and actionable at law, it is necessary that, in addition to the promise, there should be some ground recognized by the law ('causa civilis'). Hence the somewhat restricted sense in which the term 'contractus' is used in Roman law. A contract in the Roman sense, is not any declaration of consensus which is intended to create an obligation, but only a declaration of consensus which results in an obligation actionable by the civil law.

An obligatory promise may become actionable by the civil law in one of four ways: (1) re, i. e. by the fact that, in addition to the obligatory consensus, there is performance by one party entitling him to claim counter-performance from the other (Real Contracts, § 66); (2) verbis, i. e. by the fact that the obligatory consensus is orally expressed in a particular form, viz. in the form of a question and answer (Verbal Contracts, § 67); (3) literis, i. e. by the fact that the obligatory consensus is expressed by an entry in the domestic ledger (Literal Contracts, § 68); (4) in certain exceptional cases the simple obligatory consensus, without more, may be actionable (Consensual Contracts, § 69).

These four classes of contracts constitute the contractual system of Roman law.

The oldest times did not possess the same variety of contracts.

The most important contract in early Roman law is nexum, i. e. a solemn loan effected in formal terms (damnas esto dare) per aes et libram, in the presence of five witnesses and with the assistance of a libripens (sup. p. 26). By virtue of the self-pledge implied in nexum—the debtor is 'nexus' because he allowed the words

'damnas esto' to be pronounced over him—he (the debtor) § 65.
becomes answerable with his own person for the repayment of the debt. On default, the creditor may proceed to execution by manus injectio at once (sup. pp. 157, 158, 210), and if no one appears to raise a vindicatio in libertatem on the debtor's behalf, the creditor may take him away as his bondsman for debt. It was on account of this stringent mode of execution that nexum continued to be employed even after coined money was introduced and the piece of aes weighed out by the libripens was thereby deprived of its value as money. The actual payment of the loan was henceforth a matter independent of the nexum, but the use of the forms of nexum continued to confer on the creditor (the lender) the full powers of execution which the early law had provided for. When subsequently a lex Vallia did away with the harsh effects of a personal liability incident to the contract of nexum, this contract fell into disuse. Nothing remained but an informal contract of loan called 'mutuum,' which came to be recognized as directly actionable. Mutuum was a real contract bearing the characteristic features of the new law—the jus gentium—which was, at this time, in course of development, and only retained a trace of its early associations in so far as it was treated as a negotium stricti juris, i. e. in so far as the sole duty of a debtor in a contract of mutuum, as such, was to repay the exact amount he had received, neither more—he was, for example, never bound to pay interest (inf. § 67)—nor less.

Besides nexum, but designed for quite different purposes, a second kind of contract came into use, viz. the so-called 'mancipatio fiduciae causa,' which gave rise to an actio bonae fidei called the actio fiduciae (sup. p. 36). Just as a mancipatio fiduciae causa could be utilized for purposes of a contract of pledge (sup. p. 272), so it might be utilized for purposes of a depositum (the thing being mancipated to a friend fiduciae causa), or of a commodatum, in short, for purposes of any kind of contract involving the giving up of a thing subject to a duty to restore it (e. g. mandatum, hire). The drawback in all these cases was that, though the practical result contemplated by the parties was never to make the person receiving the thing owner, but only pledgee, depositarius, commodatarius, and so forth, as the case might be, he

§ 65. had nevertheless to be formally constituted owner by means of the mancipatio. Consequently the party who delivered the thing had no other remedy but a personal right to recover it from the first person who received it (or his heir), in other words, he had merely an obligatory right, because the effect of the mancipatio was to deprive him of his ownership. But just as in lieu of mancipatio for purposes of a pledge the mere agreement to create a right of pledge was, at a later time, directly acknowledged as valid, so it came to be held that the mere giving up of a thing—without any mancipatio and consequent transfer of ownership—was sufficient to establish a claim for the restoration of the thing (the commodatum, depositum). Mancipatio fiduciae causa was thus superseded by a series of real contracts (commodatum, depositum, pignus), all of which preserved their original character in so far as they were regarded as negotia bonae fidei.

Nexum and mancipatio fiduciae causa were the original sources of real contracts. In addition to these, sponsio—which was at the outset a solemn vow in which the promisor denounced himself to the gods in the event of his not keeping his vow (sup. p. 38)—came to be employed for legal purposes. The old religious act having been replaced by a mere verbal transaction (viz. a formal question and answer: spondesne? spondeo), sponsio appeared in the shape of the verbal contract of Roman law (stipulatio), and as such was invested with legal effects.

The Literal Contract was developed at a comparatively early period and obviously in connection with the contract of loan. The entry by A in his domestic ledger that he had paid a certain sum to B (expensilatio)—an act which originally had merely evidentiary value—gradually developed into an act the effect of which was to create, of its own force, an independent obligation. Like mutuum and stipulatio, expensilatio engenders an obligatio stricti juris. Thus a contract of loan (nexum) and a religious vow (sponsio) are the original sources of the negotia stricti juris, just as fiducia is the origin of the negotia bonae fidei.

The development of the so-called Consensual Contracts, i. e. those exceptional cases where the mere consensus without more is

sufficient to engender an obligation, is closely associated with the triumphant progress of the jus gentium (p. 38 ff.). It was natural that informal juristic acts should first assert their innate force within the domain of the law of obligations. Towards the close of the republic the most important transactions of daily intercourse (sale, hire, partnership, mandatum) were fully acknowledged to possess legal validity quite regardless of any question of form. § 65.

§ 2 I. de oblig. (3, 13): Aut enim ex contractu sunt (obligationes), aut quasi ex contractu, aut ex maleficio, aut quasi ex maleficio. Prius est, ut de his, quae ex contractu sunt, dispiciamus. Harum aeque quattuor species sunt: aut enim re contrahuntur, aut verbis, aut litteris, aut consensu.

Varro de ling. lat. VII § 105: Nexum Mamilius scribit omne, quod per libram et aes geritur, in quo sint mancipia; Mucius quae per libram et aes fiant, ut obligentur, praeter quae mancipio dentur.

XII tab. VI 1: Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto.

§ 66. *Real Contracts.*

Real contracts are contracts which are actionable on the ground of performance by one party of his part (res); cp. § 65. § 66.

Roman law distinguishes two kinds of real contracts, nominate and innominate real contracts.

I. Nominate Real Contracts.

Of nominate real contracts we have four: mutuum, commodatum, depositum, pignus.

(*a*) Mutuum, or Loan (for Consumption).

Mutuum arises when a person transfers a certain quantity of res fungibiles (sup. p. 228), the transferee becoming owner of the things, subject to an obligation to restore the same amount of the same quality as he himself had received. Mutuum is a negotium stricti juris; the action to which it gives rise is the condictio certi. The contract of loan only binds the borrower to repay the exact amount of capital he received, neither more nor less; it does not bind him,

§ 66. more particularly, to the payment of interest. Even though he be in mora (having failed to pay his debt when due in spite of notice received from the creditor), he is not obliged to pay interest on account of such mora, nor again is he bound by a mere agreement to pay interest. If it is desired to make the debtor in a mutuum liable for interest as well as capital, a second contract is required over and above the contract of loan, viz. a *verbal* contract (the stipulatio for payment of interest, inf. p. 297).

The senatusconsultum Macedonianum forbids loans of money to filiifamilias. If a filiusfamilias was sued on the loan, the praetor allowed him to plead the exceptio senatusconsulti Macedoniani (cp. p. 200).

(*b*) Commodatum, or Loan for Use.

Commodatum arises when A (the lender) delivers a thing to B (the borrower) to the end that B shall use it gratuitously in a specified manner. The borrower here does not become owner of the thing. Commodatum is a negotium bonae fidei. Both parties are bound to do all that is required by bona fides. In the first place, and in all cases, the borrower (commodatarius) has a duty towards the lender (commodans): he is bound to redeliver the thing. If he fails in this duty, the lender has the actio commodati directa. It is only in certain circumstances that the lender incurs a liability as against the borrower. The borrower can enforce such liability by the actio commodati contraria. Nor do the requirements of good faith impose the same duties on either party. The borrower is the party who is interested in the contract. It is he who has the benefit of the transaction. He is bound, therefore, even without having given any promise to that effect, to exercise omnis diligentia, i. e. he is liable for culpa levis (sup. p. 287). The lender, on the other hand, is not interested in the contract. He derives no benefit from the transaction. Hence he is only liable for dolus and culpa lata.

(*c*) Depositum, or Bailment.

Depositum arises when A delivers a movable thing to B for the purpose of gratuitous safe custody. It is a negotium bonae fidei. Both parties are bound to do all that is required by bona fides. In the first place, and in all cases, the depositary (i. e. the receiver of

the depositum) has a duty towards the depositor: he is bound to redeliver the thing deposited. If he fails in this duty, the depositor has the actio depositi directa. It is only in certain circumstances that the depositor incurs a liability as against the depositary. The depositary can enforce such liability by the actio depositi contraria. Here too the duties imposed on either party by the requirements of good faith are not the same. The depositary is not interested in the contract. He derives no benefit from the transaction. Hence he is only liable for dolus and culpa lata. The depositor, on the other hand, is interested in the transaction. It is for his benefit that the contract exists. Hence he is bound to exercise omnis diligentia, i. e. he is liable to the depositary for culpa levis, and is bound to recoup him for all expenses incurred in connection with the thing. § 66.

(*d*) Pignus, or Pledge.

Pignus arises when a thing is delivered in pledge. We have already discussed pignus (sup. § 59), as far as the *real* right of pledge is concerned which the creditor acquires in the thing pledged. But the delivery of the thing, besides giving the creditor this real right, gives the debtor (pledgor) an obligatory right against the pledgee personally, the right namely, on certain conditions, to recover the thing pledged. It is in this sense that we speak of a *contract* of pledge, and we are here only concerned with pignus in so far as it gives rise to such a contract. Like commodatum and depositum, pignus is a negotium bonae fidei. It binds both parties to do all that is required by bona fides. In the first place the pledgee has a duty towards the pledgor, the duty, namely, to restore the pledge as soon as the debt which it was intended to secure is discharged, or—if he has exercised his right of sale—to hand over the balance after paying himself out of the proceeds (hyperocha, sup. p. 276). The pledgor has the actio pignoraticia directa. It is only in certain circumstances that the pledgor incurs a liability as against the pledgee, e. g. to recoup him for expenses in connection with the pledge. In such cases the pledgee has the actio pignoraticia contraria. In this instance both parties are interested in the contract by means of which one obtains credit, the other security. Hence both parties are answerable for omnis diligentia.

§ 66. II. Innominate Real Contracts.

In addition to the real contracts just enumerated certain other real contracts, the so-called 'innominate real contracts,' became actionable at a later period. The Romans, namely, adopted the principle that wherever there were mutual promises of mutual performance the party who had performed his part should, on the ground of such performance, be entitled at once to exact counter-performance from the other. The action, in such cases, was based not on the consensus as such, but on consensus coupled with performance (res); in a word, on a *real* contract. But since the nature of the acts to be respectively performed might vary indefinitely, no fixed general name applicable to all such cases came to be adopted. Hence they are called nowadays 'innominate' real contracts.

It was in the form of an innominate real contract, on the principle just explained, that Exchange—taking the word in its widest sense—became actionable in Roman law. The Corpus juris distinguishes four categories, differing according to the nature of the acts to be respectively performed: do ut des, do ut facias, facio ut des, facio ut facias. The action by which a person who has done his part claims counter-performance on the ground of his own performance is called the actio in factum praescriptis verbis or actio in factum civilis (cp. p. 180, n. 1).

Praescriptis verbis agere is not, however, a form of legal redress confined to cases of innominate real contracts. It serves a much wider purpose, the purpose, namely, of generally supplementing the system of actions ex contractu. Whenever the traditional formulae of actions (i. e. the formulae already set out by the praetor in his album) are found inadequate, and yet the facts are clearly sufficient to establish a dare facere oportere ex bona fide, a formula with a demonstratio in factum concepta (l. 6 § 1 C. 2, 4: quae praescriptis verbis rem gestam demonstrat) is drawn up with special reference to the circumstances of the particular case. The demonstratio namely (cp. p. 187) sets forth the concrete facts ('in factum') so far as they bear on the alleged agreement, in order that the judge, having regard to these facts, may condemn the defendant to quidquid ob eam rem dare facere oportet ex bona fide (i. e. the intentio is juris civilis).

This is what is meant by 'praescriptis verbis agere'—a proceeding which is available in all cases where, on the one hand, the existence of a liability is undoubted, but, on the other hand, doubts exist concerning the legal nature of the underlying facts, in other words, concerning the possibility of making the agreement in question tally with any of the traditional categories of contracts. And this is what occurs in the cases of innominate real contracts, i. e. the plaintiff must sue for counter-performance praescriptis verbis, because there is no settled category, no fully developed pattern—as there is in the case, say, of a loan, a deposit, or a sale—to which the facts of this contract are strictly applicable. But precisely the same thing occurs in all those other cases where the fixed categories of the law are found to be too narrow for the exhaustless profusion of legal relations[1]. § 66.

pr. I. quib. mod. re contrahitur obl. (3, 14): Re contrahitur obligatio veluti mutui datione. Mutui autem obligatio in his rebus consistit, quae pondere, numero mensurave constant, veluti vino, oleo, frumento, pecunia numerata, aere, argento, auro: quas res aut numerando, aut metiendo, aut adpendendo in hoc damus, ut accipientium fiant, et quandoque nobis non eaedem res, sed aliae ejusdem naturae et

[1] The following examples will illustrate the manner in which the procedure praescriptis verbis was adapted to different purposes. A delivers a thing to B for purposes of valuation (l. 1 § 2 D. 19, 5), or of inspection (l. 23 eod.). These being neither cases of depositum (because the thing is not delivered for safe custody) nor of commodatum (because it is not delivered for use), the plaintiff must proceed praescriptis verbis. Or again, if it is doubtful whether the facts of a case constitute a contract of locatio conductio (l. 23 D. 10, 3), and, if they do, whether it is a locatio conductio rei or a locatio conductio operis (l. 1 § 1 D 19, 5), the plaintiff must sue praescriptis verbis. In the same way proceedings praescriptis verbis must be resorted to where a donor wishes to enforce a trust expressly accepted by the donee in his (the donor's) favour (a trust, say, binding the donee to pay for the donor's maintenance), or where a person who, in pursuance of a compromise, has performed his part, wishes to exact counter-performance from his adversary.—On the actio praescriptis verbis cp. Pernice, *ZS. d. Sav. St.* vol. ix. p. 248 ff.; Gradenwitz, *Interpolationen in d. Pandekten* (1887), p. 122 ff. (with Lenel's remarks thereon in the *ZS. d. Sav. St.* vol. ix. p. 181). Gradenwitz has succeeded in proving that the 'actio' praescriptis verbis was originated by the Byzantine jurisprudence, and that the compilers inserted it in the Corpus juris by means of an interpolation. The term used by the classical Roman jurists is never *actio* praescriptis verbis, it being just the essence of these cases that they are *not* covered by a fixed individual actio, but always praescriptis verbis *agere*, i. e. a general form of action available in numerous cases of a widely different character.

§ 66. qualitatis reddantur. Unde etiam mutuum appellatum sit, quia ita a me tibi datur, ut ex meo tuum fiat. Ex eo contractu nascitur actio, quae vocatur condictio.

§ 2 eod.: Item is, cui res aliqua utenda datur, id est commodatur, re obligatur et tenetur commodati actione. Sed is ab eo, qui mutuum accepit, longe distat. Namque non ita res datur, ut ejus fiat; et ob id de ea re ipsa restituenda tenetur. Et is quidem, qui mutuum accepit, si quolibet fortuito casu quod accepit amiserit, veluti incendio, ruina, naufragio, aut latronum hostiumve incursu: nihilo minus obligatus permanet. At is, qui utendum accepit, sane quidem exactam diligentiam custodiendae rei praestare jubetur, nec sufficit ei, tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est . . . Commodata autem res tunc proprie intellegitur, si, nulla mercede accepta vel constituta, res tibi utenda data est. Alioquin, mercede interveniente, locatus tibi usus rei videtur. Gratuitum enim debet esse commodatum.

L. 5 pr. D. de praescr. verb. (19, 5) (PAULUS): Naturalis meus filius servit tibi et tuus filius mihi. Convenit inter nos, ut et tu meum manumitteres, et ego tuum. Ego manumisi, tu non manumisisti; qua actione mihi teneris, quaesitum est. In hac quaestione totius ob rem dati tractatus inspici potest, qui in his competit speciebus: aut enim do tibi, ut des; aut do, ut facias; aut facio, ut des; aut facio, ut facias.

§ 67. *The Verbal Contract.*

§ 67. The verbal contract of Roman law is Stipulatio. It arises 'verbis,' i. e. by the employment of words in a particular form, in the form, namely, of question and answer. The creditor asks the debtor: spondesne mihi centum dare? The debtor answers: spondeo. This form of sponsio was regarded as specifically Roman (i. e. as being juris civilis), and could only be employed, therefore, among Roman citizens[1]. But instead of saying 'spondesne,' the creditor

[1] As to the manner in which sponsio was developed from a religious act v. sup. p. 38, n. 13. The fact that such a sponsio originally only gave rise to a moral obligation (i. e. an obligation towards the gods), left its traces even in classical Roman law, where certain kinds of stipulationes, e.g. the stipulatio by which a betrothal was effected (v. inf. at the end of § 79) were not enforceable by action.

might also use the word 'promittisne' or some similar term. And these latter forms were regarded as being juris gentium and could therefore be validly employed by aliens as well as citizens. In Justinian's law it is immaterial what words are used. All that is essential is that the obligatory consensus shall be established by a question on the part of the creditor and a corresponding answer on the part of the debtor. Given these conditions the contract is valid and actionable on the ground of the form in which the words are put, and it is immaterial whether the debtor received any consideration for his promise or not. All that the creditor need prove is that, as a matter of fact, the stipulatio was concluded. The debtor's obligation rests on the verba and on them alone. § 67.

In consequence of this its peculiar nature stipulatio is employed to fulfil a twofold function, the function namely (1) of originating an obligation and (2) of transforming an obligation.

I. Stipulatio as originating an obligation.

Stipulatio serves the purpose of originating an obligation in so far as it is used to convert an informal promise into a formal one. An informal promise, as such, is not actionable according to the Roman law of contract (sup. p. 288). As soon however as it is clothed in the form of a stipulatio it becomes actionable. By means of a stipulatio any promise can be raised to the rank of a 'contract.' The following are examples in point: a stipulatio for the payment of interest, a stipulatio for the payment of a specified penalty, and the contract of suretyship.

(1) *Stipulatio for the payment of interest.*

If the debtor in a contract of loan gives an informal promise to pay interest, such promise is not actionable (sup. § 66). Whenever it is intended to bind a borrower, on receiving his loan, to pay interest, a second contract is needed over and above the real contract of mutuum, viz. the verbal contract of stipulatio. The creditor asks the debtor: 'Will you pay me such and such monthly interest?' The debtor answers in the affirmative. He is now under an obligation to pay interest, an obligation which is actionable, not indeed *re* (for the contract of loan cannot create any obligation to pay interest), but *verbis*. The Romans were in the habit of calculating interest by

§ 67. the month, though it does not follow that it was paid by the month. The rate of interest is expressed as follows:—

centesimae usurae	=	1	per cent.	per month	or	12	per cent. per ann.
semisses	„	= $\frac{1}{2}$	„	„	or	6	„ „
trientes	„	= $\frac{1}{3}$	„	„	or	4	„ „
besses	„	= $\frac{2}{3}$	„	„	or	8	„ „

The interest 'stipulated' for is not allowed to exceed a certain limit. The Twelve Tables fixed the maximum at $\frac{1}{12}$ of the capital (foenus unciarium). This was subsequently reduced to $\frac{1}{24}$ of the capital (foenus semunciarium). From the close of the republic centesimae usurae became the usual legal maximum. Justinian finally fixed semisses usurae—apart from one exception—as the highest allowable rate of interest in all cases. Anatocismus, or the payment of interest upon interest, is forbidden. A stipulatio for the payment of interest is void to the extent to which it exceeds the legal maximum. Arrears of interest can only be recovered to the extent of the capital debt, i. e. not 'ultra alterum tantum.'

(2) *Stipulatio to pay a specified penalty.*

The stipulatio to pay a specified penalty was of considerable practical importance in Roman law. It was resorted to in all cases where a direct civil law title could not be validly created, and yet the parties felt the need of a title which should be legally secure (cp. e. g. the case of servitudes, sup. p. 264).

(3) *Suretyship (Fidejussio).*

A contract of suretyship is a contract whereby a man binds himself to be personally answerable (i. e. answerable with his own credit) for the debt of another, as accessory debtor, in addition to the person principally liable[2]. Here again an informal promise to the

[2] In the oldest times the 'vadimonium' served the purposes of a suretyship. Vadimonium was a solemn promise to pay a specified penalty, if a certain third party failed to meet a particular obligation (e. g. to pay a debt or answer a summons before court). A 'vas' is not a surety in our sense of the word, because the liability he undertakes is not the same as that of the principal, but is a new liability with *different* contents; cp. Voigt, *Die Zwölf Tafeln*, vol. ii. p. 490 ff. On the other hand sponsio (which originated in the religious vows of the earliest times, v. note 1) is a suretyship in our sense of the term (idem dare spondes?). And when the forms of stipulatio were further developed, another kind of suretyship grew up side by side with sponsio, viz. fidepromissio (idem fidepromittis?). Sponsio, whether used for purposes of

same effect would have been void at civil law. Hence the forms of stipulatio are resorted to. The creditor asks: centum, quae Titius mihi debet, eadem fide tua esse jubes? The surety replies: fide mea esse jubeo. The effect of such a fidejussio is to make the surety correal debtor (§ 61) with the principal debtor, his correal liability being accessory to that of the principal, i. e. he (the surety) is liable *after* the principal debtor. It is for this reason that, in the first place, the liability of the surety depends on the existence of the principal debt, and that, in the second place, the surety has the 'beneficium excussionis' (sometimes called the 'beneficium ordinis') —not granted however till Justinian (Novel 4)—which consists in the right to demand that the principal debtor, being present and solvent, shall be sued first. An epistola divi Hadriani gave several co-sureties the exceptio divisionis, i. e. the right to demand that the creditor should divide his claim pro rata between such sureties as were present and solvent (sup. p. 283). § 67.

Suretyship is a species of so-called 'intercessio.' Intercessio

suretyship or any other purpose, is invariably juris civilis; fidepromissio, on the other hand (like fidejussio), is also open to aliens. The youngest form of suretyship, and one which was, from the very outset, secular in character, is probably fidejussio (idem fide tua esse jubes?). Fidejussio (which is discussed in the text) is the only form of suretyship known in Justinian's law. Formally speaking, it implies neither a sponsio nor a promissio, but merely, in the most general way, a desire (jussio) that the principal debtor shall be given credit on the faith of the credit of the surety. Hence fidejussio was applicable to any liability (including e. g. a liability ex delicto), whereas sponsio and fidepromissio were only applicable to liabilities arising from a verbal contract (stipulatio). Again, the liability of a sponsor or fidepromissor, being originally of a purely religious character (cp. Pernice, *Berliner Sitzungsberichte*, vol. li. p. 1191), did not pass to his heir, and was moreover limited to two years (by the lex Furia de sponsu, 345 B. C.). The liability of a fidejussor, on the other hand, passed to his heir, and the action against him was an actio perpetua. The same lex Furia further enacted that, as between several co-sponsors and co-fidepromissors, the debt guaranteed should be ipso jure divided according to the number of the sureties, without taking the solvency of individual sureties into account. Co-fidejussors, on the other hand, were severally liable for the whole debt. It was not till Hadrian that they were granted the beneficium divisionis, not however ipso jure, but only ope exceptionis (p. 283), the solvency of the other sureties being moreover taken into account in determining the share of each (see text). Cp. Gaj. iii. § 115 ff. Everything points to the conclusion that, whereas, from the very outset, fidejussio was possible even *after* the principal debt had come into existence, sponsio and fidepromissio could originally only be effected simultaneously with the sponsio of the principal debtor, i. e. by means of *con*spondere and *con*promittere. Hence the duty to 'praedicere' subsequently required from the creditor (Gaj. iii. § 123).

§ 67. means a liability incurred on behalf of a third party. The conception of intercessio is important, because the senatusconsultum Vellejanum (46 A. D.) prohibited women not only from becoming sureties, but from entering on any form of intercessio, thus debarring them, for example, from discharging a debtor by a novating stipulatio (inf. II), or from creating a pledge, or accepting a loan in the interests of a third person. If a woman were sued on an intercessio —be it suretyship or any other form—she could plead the exceptio senatusconsulti Vellejani (cp. p. 199).

II. Stipulatio as transforming ('novating') an obligation.

Stipulatio serves the purpose of transforming ('novating') an obligation wherever it is desired, for some reason, to replace a subsisting obligation by a new obligation based on stipulatio. The desire thus to transform an obligation may be due to an intention of changing the parties to the obligation, or it may be due to other reasons unconnected with any change of parties. In either case the obligation is said to be 'novated,' i. e. renewed or transformed.

(1) *Novation with change of parties.*

Novation may serve the purpose of effecting a change of parties, when it is desired to substitute a different creditor or debtor in place of the former one. For example: A declares himself willing to pay B's debt, and B's creditor agrees to accept A as his debtor in lieu of B. In such a case B (the debtor) will be released from his debt —even without knowing it himself—by A's promise in the stipulatio (the so-called 'expromissio'). The novating stipulatio operates to *transform* the debt. A's debt by stipulatio replaces B's debt under the contract of loan. In ordinary cases, the former debtor (B) is a party to such a transaction. He may, for example, direct ('delegate') another person, who owes him money, to bind himself by stipulatio to pay such money to his (B's) creditor. And conversely, the person of the creditor may be changed, i. e. the stipulatio may be made in favour of a new third party. In such cases a direction ('delegation') on the part of the previous creditor is indispensable, in order that the new stipulatio may operate to extinguish the old debt. Delegation is an instruction to do some act (whether it be dare, or

promittere, or liberare) involving a change of parties[3]. In the two cases just dealt with the delegation is an instruction to promittere, an instruction, namely, to conclude a stipulatio involving a change of parties[4]. § 67.

(2) *Novation without change of parties.*

A novating stipulatio may be designed to serve a particular purpose desired by the parties, without involving any change of parties. For example: A owes money to B under a contract of sale. The sale is perfectly valid and actionable. Nevertheless, if B sues A on the sale, he may very possibly be compelled to go into all the facts of the case so far as they bear on the conclusion of the contract; he may be called on to prove that he has duly and properly performed his part, and so forth. In such a case it is much simpler to resort to a stipulatio. As soon as the relationship of vendor and purchaser is completely established and both parties are agreed that a sum, say, of exactly 100 aurei is due by way of purchase-money, the vendor asks the purchaser: 'centum mihi dare spondes'? and the purchaser replies 'spondeo.' The result of the transaction is that the purchaser now owes 100 aurei by *a verbal contract.* The creditor, in taking his action, need only allege and establish that a stipulatio was concluded. The facts of the case, instead of being concrete, complicated, and open to all kinds of objections, are simple and unequivocal. Was there, or was there not, an *abstract* promise to pay given in the form of a stipulatio? The purpose of the stipulatio, in this instance, is not to make the consensus actionable—for it is actionable in any case—but rather to make it actionable in a different and an easier way. The force of the novating stipulatio is to convert a concrete liability into an abstract one, i. e. to convert a liability which rests on definite

[3] The act to be performed in favour of the third party is intended to have the same force and effect as though it had been performed in favour of the delegans himself. A instructs B to pay X the 100 aurei which he (B) owes to A. This is an instruction to *dare.* Or: A instructs B to promise X (by stipulatio) the 100 aurei which he (B) owes to A. This is an instruction to *promittere.* Or: A instructs B to pay him 100 aurei by releasing X from a debt of 100 aurei. This is an instruction to *liberare.*

[4] Thus delegation only results in a novation (1) when the delegatus is instructed to *promittere,* (2) when the delegation refers to *an existing debt.* The second requirement, however, is not indispensable. Delegation *may* be designed for other purposes, e. g. for the purpose of effecting a loan for the delegans (in which case the object of the delegation is to give *credit*), or of obtaining a gift for him.

§ 67. economic facts into one which is, as it were, cut off from its connection with these facts. This result may be brought about, as we saw above (sup. under (1)), in such a manner as to involve, at the same time, a change in the parties in respect of the liability in question. Such a change, however, is not essential for purposes of novation. The mere fact that the parties desire to change the ground of the action is sufficient to occasion, and to render possible, the conclusion of a novating stipulatio.

III. The nature of stipulatio and remedies thereon.

Stipulatio is a negotium stricti juris, i. e. a contract which results in the creation of a rigorously unilateral obligation. The promisor is bound to do precisely what he promised, neither more nor less. In the absence of an express undertaking to the contrary, he is not bound to use diligentia, nor to pay interest on account of mora, nor in any other way to compensate the creditor for an 'interesse' of any kind. The stipulatio binds him to perform exactly what he promised and nothing more.

The action to which a stipulatio gives rise is a condictio, in other words, an actio stricti juris where the legal ground of the action is not specified. Where the defendant promises by stipulatio to dare certam pecuniam, the 'condictio certi' is employed; where he promises to dare certam rem (other than pecunia) the 'condictio triticaria'; where he promises to facere (sup. § 62), the 'condictio incerti.' Instead of bringing the condictio incerti the plaintiff can also proceed by the actio ex stipulatu, likewise an actio stricti juris in which, however, the ground of the action is specified [5].

IV. Adstipulatores and Adpromissores.

If the creditor in a stipulatio associates with himself another

[5] The formula in a condictio only names the *object* of the action (certa pecunia, certa res, incertum), not the *ground* (whether it be loan, stipulatio, or any other) on which the action is based. Wherever, therefore, the stipulatio was for something certain (certa pecunia or certa res), the only remedy was an action not specifying the ground on which it rested (viz. condictio). But wherever an incertum was promised, the plaintiff had the choice between the condictio incerti and the actio ex stipulatu, the latter of which specified, in its formula, the stipulatio as the ground on which the action was taken (quod A^us^. de N^o^. incertum stipulatus est, quidquid ob eam rem N^um^. A^o^. dare facere oportet, condemna).—L. 24 D. de reb. cred. (12, 1): Si quis *certum* stipulatus fuerit, *ex stipulatu actionem non habet*, sed illa condicticia id persequi debet, per quam certum petitur.—Cp. sup. pp. 155, 187.

person, who, in the interest of such creditor, stipulates from the debtor for the same act, such person is called an adstipulator. He becomes a second creditor (a correal creditor) concurrently with the true creditor, and is, as such, formally entitled to all the rights of a creditor, subject, however, to an obligation in no way to abuse the rights thus conferred upon him (inf. § 72, n. 4), and more especially to pay over to the true creditor or his heir whatever he may receive from the debtor. In substance, then, an adstipulator is merely an agent of the creditor. His rights consequently perish on his death, and if he is in the 'power' of another person, his rights as adstipulator are not acquired by such person. Adstipulatio by a slave is void. Adstipulatio by a filiusfamilias only operates if the filiusfamilias leaves the paternal power without capitis deminutio (sup. § 24). Adstipulatio is employed, for instance, when I desire to have a person who shall be, for all practical purposes, my representative, and shall be moreover entitled to proceed on his own account against the debtor. For an adstipulator is, formally speaking, not merely a representative, but a creditor himself[6]. Or again, it is employed for the purpose of evading the prohibition which the law prior to Justinian imposed on stipulationes where the money was not to be paid till after the death of the stipulator, in other words, was to be paid to the stipulator's heirs. This prohibition could be evaded by means of an adstipulatio in which the adstipulator was promised payment after the stipulator's death. Such a stipulatio was perfectly valid. If the adstipulator was living at the time of the death of the person for whom the payment was really intended, he could sue for the sum promised, and having recovered it, would hand it over to the heir of the deceased. In every case the adstipulator was in point of form (i. e. as against the debtor) a creditor; in substance, however (i. e. as against the creditor), he was a mere agent. § 67.

If the debtor in a stipulatio associates with himself another person who, in the interest of such debtor, gives the same promise

[6] The use of this form of representation seems to have been particularly common in commercial dealings in Rome. There were people who acted as professional adstipulatores. Cp. Rümelin, *Zur Geschichte der Stellvertretung* (1886), p. 73.

§ 67. by stipulatio, such person is called an adpromissor. The chief case of adpromissio is fidejussio which we have already discussed. Just as adstipulatio produces an active, so adpromissio produces a passive correal obligation.

pr. I. de verb. obl. (3, 15): Verbis obligatio contrahitur ex interrogatione et responsu, cum quid dari fierive nobis stipulamur. Ex qua duae proficiscuntur actiones, tam condictio, si certa sit stipulatio, quam ex stipulatu, si incerta. Quae hoc nomine inde utitur, quia stipulum apud veteres firmum appellabatur, forte a stipite descendens.

§ 1 eod.: In hac re olim talia verba tradita fuerunt: SPONDES? SPONDEO.—PROMITTIS? PROMITTO.—FIDEPROMITTIS? FIDEPROMITTO. — FIDEJUBES? FIDEJUBEO. — DABIS? DABO. — FACIES? FACIAM. Utrum autem latina, an graeca, vel qua alia lingua stipulatio concipiatur, nihil interest, scilicet si uterque stipulantium intellectum hujus linguae habeat. Nec necesse est, eadem lingua utrumque uti, sed sufficit, congruenter ad interrogatum respondere; quin etiam duo Graeci latina lingua obligationem contrahere possunt. Sed haec sollemnia verba olim quidem in usu fuerunt; postea autem Leoniana constitutio lata est, quae, sollemnitate verborum sublata, sensum et consonantem intellectum ab utraque parte solum desiderat, licet quibuscumque verbis expressus est.

§ 13 I. de. inut. stip. (3, 19): Post mortem suam dari sibi nemo stipulari poterat, non magis, quam post mortem ejus, a quo stipulabatur . . . . Sed, cum (ut jam dictum est) ex consensu contrahentium stipulationes valent, placuit nobis, etiam in hunc juris articulum necessariam inducere emendationem, ut, sive post mortem, sive pridie quam morietur stipulator sive promissor, stipulatio concepta est, valeat stipulatio.

GAJ. Inst. III § 110: Possumus tamen ad id, quod stipulamur, alium adhibere qui idem stipuletur, quem vulgo adstipulatorem vocamus. § 117: Adstipulatorem vero fere tunc solum adhibemus, cum ita stipulamur, ut aliquid post mortem nostram detur: [quod] stipulando nihil agimus. Adhibetur adstipulator, ut is post mortem nostram agat; qui, si quid fuerit consecutus, de restituendo eo mandati judicio heredi meo tenetur.

§ 68. *The Literal Contract.*

Just as nowadays every business man keeps his books for registering his business transactions, so in Rome every well-to-do citizen kept his domestic books for registering all facts concerning his proprietary position. These books were of three kinds. Firstly, there were books for keeping inventories of his property. Secondly, there were books for calculating the state of his property. Lastly, there were books for effecting changes in the state of his property. § 68.

As to the first of these, it was usual for the head of a Roman family to keep an inventory of his property in a book called the liber patrimonii, or libellus familiae. This book contained a catalogue of everything that belonged to him, whether movable or immovable, classified according to definite categories (praedia, instrumentum rusticum, suppellex, aurum, &c.). His entire taxable property, of which he was bound by oath to make a true return to the state, was entered in this book. In addition to the liber patrimonii he kept a second book likewise for purposes of an inventory only, viz. the kalendarium (liber kalendarii), in which he kept a list of such capital sums as he had lent out at interest. The book owes its name to the fact that, in Rome, it was the custom to pay interest on the first day of every month (kalendae).

On the other hand, the book which was used for calculating the state of one's property was called the codex rationum (scil. domesticarum). This was the paterfamilias' account book, the book in which he entered his receipts and expenses. In this account book there was an accepti pagina, on which the receipts, and an expensi pagina, on which the expenses were entered. The accepti ratio (i. e. the sum of the items entered on the accepti pagina) constituted the debit of the paterfamilias; the expensi ratio (i. e. the sum of the items entered on the expensi pagina) his credit. The amount yielded by the management of his property would be found by striking the balance between these two sums. In the case of a banker (argentarius) this account book took the shape of a 'codex rationum mensae,' or bank ledger; a special accepti and expensi

§ 68. pagina being kept for each customer. Neither the entries in the inventory nor the entries in the account book (codex rationum) had the effect of creating any private rights. They might be used for evidentiary purposes in an action, but they were incapable, of their own force, of *constituting* an obligation. No one could sue on the ground of such an entry alone, but only on the ground of the juristic act (sale, loan, &c.) which was evidenced by the entry.

It was the third kind of domestic book that had the effect of creating private rights, viz. the codex accepti and expensi, a book which the Roman paterfamilias kept in addition to his codex rationum. The codex accepti and expensi was designed not merely to evidence, but to *effect* alterations in the state of a person's property. It was the book for recording debts arising from literal contracts, and contained such entries as produced a legal result of their own force.

A literal obligation is an obligation which is created by an entry in the codex accepti et expensi. This entry takes the form of expensilatio. The creditor makes an entry to the effect that a certain sum has been paid by him to the debtor (expensum ferre). The debtor makes a corresponding entry that such sum has been paid to him by the creditor (expensum referre). Such an entry on the part of the debtor is not necessary. It is sufficient if the creditor makes his entry by direction (jussus) of the debtor. If the creditor's expensilatio is made with the consent of the debtor, its effect is to *constitute* an obligation, the debtor being liable whether the money was actually paid or not. He is bound literis, i. e. by the writing in the codex as such. Expensilatio ceases entirely to be the entry of a payment, in other words, of a *fact* (which originally it doubtless was), it becomes the entry of an *obligation*, of a legal relationship. The debtor is debited by expensilatio with a certain sum. He is bound to pay this sum, whatever the material grounds of his obligation may be. And it is this entry against him—an entry which takes the form (but only the form) of a payment made to such debtor—that creates his obligation to pay. The debtor is not liable on a real contract (i. e. on the ground that the money was received by him), but on a literal contract.

A literal contract gave rise to a rigorously unilateral obligatio stricti juris. The action by which it was enforced was, as with stipulatio, a condictio. § 68.

A literal contract might serve the purpose of (1) creating an obligation; (2) transforming an obligation (novation). In the latter case the 'nomen,' or item in the ledger, was called a 'nomen transscripticium.' A nomen transscripticium might be used (1) for effecting a change of parties (transscriptio a persona in personam), or (2) for effecting a change in the ground of obligation (transscriptio a re in personam). In all these respects expensilatio is like stipulatio (pp. 300, 301).

Just as a literal obligation could only be produced by a written entry (expensilatio), so, in the early law, it could only be extinguished by an act of cancelling (acceptilatio, cp. § 76 I). Acceptilatio in the codex accepti et expensi (i. e. a 'literal' acceptilatio) was the counterpart of expensilatio. The debtor made an entry to the effect that the money had been received by the creditor (acceptum ferre scil. creditori), and the creditor made a corresponding entry that he had received the money from the debtor (acceptum referre scil. debitori). Such an entry on the part of the creditor was not necessary. It was sufficient if the debtor made his entry (the acceptilatio) by direction (jussus) of the creditor. It did not necessarily follow that the creditor had actually received the money. Like expensilatio a 'literal' acceptilatio—which was doubtless originally the record of a mere fact—became the record of a legal relationship. It means that the debtor is released from his debt, and it effects this release by the act of cancelling—the acceptilatio in the codex—as such; that is to say, *literis*. Thus a literal acceptilatio may also be employed for effecting a contract of release. But it was only a literal obligation that could be discharged by means of a literal acceptilatio. No obligation could be extinguished by a literal acceptilatio unless it had first been created by expensilatio. Only entries in the codex accepti et expensi admitted of being cancelled in such codex.

The so-called 'nomen arcarium' which also occurs in the codex accepti et expensi is anomalous. It means a mere 'cash' item,

§ 68. and is opposed to a genuine item in the codex which is called nomen simply. A nomen arcarium means an entry in the codex accepti et expensi of a loan or depositum as such, i. e. an entry of a concrete ground of obligation. In such cases the obligation continues to be based on the loan, the depositum, &c., and is not converted into a literal obligation. This is not a genuine expensilatio, because it is merely the record of a fact which has produced an obligation, say, the fact that money has been paid by way of loan, that a thing has been deposited for custody, &c. Such an entry therefore has merely evidentiary force and does not *give rise* to an obligation. A genuine expensilatio, on the other hand, an expensilatio which engenders a literal contract, means the entry of an obligation, and an entry in which, on principle, the ground of the obligation is not stated—in a word, the entry of an *abstract* obligation [1].

In the course of the empire the literal contract fell into disuse. Stipulatio thus became the only means whereby the novation of an obligation could be effected, or a consensus, in itself not actionable, could be rendered actionable.

GAJ. Inst. III § 128: Litteris obligatio fit veluti nominibus transscripticiis. Fit autem nomen transscripticium duplici

[1] We have embodied in the text the conclusions which have been recently established by M. Voigt, *Ueber die Bankiers, die Buchführung und die Litteralobligation der Römer* (Abhandl. der Kön. Sächs. Gesellschaft der Wissenschaften, vol. x. 1887, p. 515 ff.).—The view which till then was most generally accepted was based, in the main, on the arguments of Keller in Sell's *Jahrbuch f. historische u. dogmatische Bearbeitung des röm. Rechts*, vol. i. (1841), p. 93 ff, and in his *Institutionen* (1861), p. 102 ff. A summary of the different views on this question will be found in Danz, *Römische Rechtsgeschichte*, § 151; Baron, *Geschichte des röm. Rechts*, vol. i. § 119.—The following facts brought out by Voigt are now practically established for the first time: (1) that the codex rationum and the codex accepti et expensi are not identical, but must be distinguished from one another; (2) that the expression corresponding to expensum ferre on the part of the creditor (viz. in the codex accepti et expensi) is not, as has hitherto been assumed, acceptum ferre, but expensum referre on the part of the debtor, and that, conversely, acceptilatio is effected by acceptum ferre (not expensum ferre) on the part of the debtor and acceptum referre on the part of the creditor. Ferre (alicui) means to debit, referre (alicui) to credit a person. It is only *ferre* which produces legal results, whether it be expensum or acceptum ferre. Hence the names expensi*latio* and acceptilatio. —The fact that it was customary to make a preliminary memorandum in a rough day-book or waste-book (adversaria, ephemeris) before making the entries in the codex accepti and in the codex rationum, is not disputed, but is legally of no importance. Every month these entries were posted from the day-book into the codices.

modo: vel a re in personam, vel a persona in personam. § 68.
§ 129: A re in personam transscriptio fit, veluti si id, quod tu ex emptionis causa, aut conductionis, aut societatis mihi debeas, id expensum tibi tulero. § 130: A persona in personam transscriptio fit, veluti si id, quod mihi Titius debet, tibi id expensum tulero, id est, si Titius te delegaverit mihi.

§ 131 eod.: Alia causa est eorum nominum, quae arcaria vocantur: in his enim rei, non litterarum obligatio consistit; quippe non aliter valent, quam si numerata sit pecunia; numeratio autem pecuniae re facit obligationem. Qua de causa recte dicemus, arcaria nomina nullam facere obligationem, sed obligationis factae testimonium praebere.

§ 69. *Consensual Contracts.*

In certain cases Roman civil law acknowledges an exception to § 69.
the rule that a bare obligatory consensus is not actionable. In these cases, therefore, the rule is: *consensu* contrahitur. Roman civil law recognized four such consensual contracts, to wit: sale, hire, partnership, mandatum.

1. Emtio Venditio, or Purchase and Sale.

Sale is a contract whereby one party (the vendor) binds himself to deliver a thing, and the other party (the purchaser) binds himself to pay a sum of money (the price). The contract is valid the moment the parties are agreed in regard to the thing to be delivered and the price to be paid. It requires neither form nor one-sided performance. It is this that distinguishes sale from exchange (sup. p. 294). Sale is a negotium bonae fidei, i. e. both parties are not only bound to do what they expressly undertook to do, but are also bound to do all that (though nothing more than) is involved in the requirements of good faith. Thus as to the purchaser, his duty is not restricted to the mere payment of the price. If he fails to pay the price in due time, he must pay interest and, generally speaking, make good to the vendor whatever detriment he (the vendor) suffered through the non-payment of the price in violation of the terms of the contract. On the other hand, the vendor is bound not only to deliver the

§ 69. thing (rem tradere), but also to warrant the purchaser against eviction (rem habere licere), i. e. if he (the vendor) was not the owner of the thing, or was not, in any way, fully entitled to the thing, and a third party consequently recovers it by process of law from the purchaser, the vendor is liable in damages. The vendor must moreover exercise omnis diligentia with regard to the thing and is answerable for latent defects, whether such defects were known to him or not. As regards such latent defects the curule aediles, who were charged with the superintendence of markets, had introduced two actions (the so-called 'aedilician actions') which, like the praetorian actions, belonged to the actiones honorariae. They were: (1) the 'actio redhibitoria,' the object of which was to rescind the contract of sale, each party restoring (redhibere) what he had received; this action was barred within six menses utiles; (2) the 'actio quanti minoris,' in which the purchaser sued for a reduction of the price proportionate to the defects discovered; this action was barred within an annus utilis (cp. pp. 191, 194). Apart from these actions, the remedies by which the vendor and purchaser enforce the rights accruing under the contract of sale are the actio venditi and emti respectively.

If the thing which the vendor has bound himself to deliver is destroyed accidentally (casu) prior to its delivery, the vendor is released from his liability, though the purchaser is still bound to pay the price. The same rule applies to an accidental deterioration of the thing, i. e. the vendor's liabilities cease on the delivery of the article thus deteriorated, and the purchaser must pay the full price. It is in this sense that the purchaser is said to bear the 'periculum rei' as soon as the sale is concluded. On the other hand, if the thing receives an unforeseen increase (if, for example, the mare purchased by me has a foal), or if it undergoes an accidental improvement or rises accidentally in value, the purchaser has the benefit of such events, for 'cujus periculum, ejus et commodum esse debet.'

'Laesio enormis' occurs when a thing is sold for less than half its value. A rescript of Diocletian allowed the vendor to rescind the sale, unless the purchaser paid up the additional amount the thing was worth.

§ 3 I. de empt. et vend (3, 23): Cum autem emptio et venditio contracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque, si homo mortuus sit, vel aliqua parte corporis laesus fuerit, aut aedes totae aut aliqua ex parte incendio consumptae fuerint, aut fundus vi fluminis totus, vel aliqua ex parte ablatus sit, sive etiam inundatione aquae, aut arboribus turbine dejectis longe minor, aut deterior esse coeperit: emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. Quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est. Sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet. Nam et commodum ejus esse debet, cujus periculum est. § 69.

L. 1 D. de evict. (21, 2) (Ulpian.): Sive tota res evincatur, sive pars, habet regressum emptor in venditorem.

2. Locatio Conductio, or Letting and Hiring.

There are three forms of locatio conductio: locatio conductio rei; locatio conductio operarum; locatio conductio operis.

(1) 'Locatio conductio rei' is a contract of hire whereby the locator agrees to let the conductor have the use of a thing in consideration of a money payment. The conductor has the actio conducti; the locator the actio locati.

(2) 'Locatio conductio operarum' is a contract whereby one party agrees to supply the other with a certain quantum of labour in consideration of a money payment. Contracts with servants, labourers, assistants, &c., are cases in point. The employer (hirer) of the labour has the actio conducti; the person who supplies, or 'lets out,' the labour, has the actio locati. The subject-matter of a locatio conductio operarum must always consist of 'operae illiberales,' i. e. unskilled services which have their price, which are *paid for* by the hire-money agreed upon. The rendering of such services is an act which is reducible to a money value. The services, on the other hand, of a mandatary, a friend, a physician, or a teacher are not susceptible of a money valuation.

§ 69. (3) 'Locatio conductio operis' is a contract whereby one party agrees, in consideration of a money payment, to supply the other, not with labour, but with the *result* of labour. Such would be a contract concluded with a common carrier (concerning either persons or goods), a contract to do repairs or alterations, or to manufacture something. In these cases the person who promises to find the labour is, at the same time, the master, i. e. the employer of the labour himself. He is not bound to obey the orders of the other party and follow his instructions in regard to the details of the work. All he is bound to do is to produce the desired result. Hence, in this case, the party who promises to find the labour is called the conductor operis; he has, as it were, hired the job (opus); he employs the labour in lieu of the other who is more properly concerned in the opus. The party who receives the labour is called the locator operis, because he has, as it were, let out the opus to the other party. In this case, therefore, the person who accepts the labour has the actio locati; the person who supplies the labour the actio conducti[1].

In all these cases the contract of hire is a negotium bonae fidei. Both parties are bound to exercise omnis diligentia and, generally speaking, to do everything that is required by bona fides in accordance with the circumstances of the case. A lessor is thus bound, among other things, to allow his lessee, in bad years, a proportionate reduction of his rent ('remissio'), and, conversely, the lessee, if he subsequently recoups himself by an abundant harvest, is bound to make up the amount which was previously remitted from his rent.

In a sale the price must be paid, on principle, concurrently with the delivery of the thing sold, unless indeed there is an express or tacit understanding to the contrary; in a contract of

[1] Locare means literally 'to place,' 'to put into certain hands,' viz. that which is to be let out, be it a thing or labour or a particular job. Conducere means literally to 'bring together,' viz. the necessary working power (a term which seems to have been first employed in the locatio conductio operarum). Cp. Degenkolb, *Platzrecht und Miete* (1867), p. 133 ff; Mommsen in the *ZS. d. Sav. St.* vol. vi. p. 263 ff. Degenkolb, *loc. cit.* p. 127 ff., was the first to point out the important bearing on the development of the private law of letting and hiring of the public contracts of hire concluded by the magistrate in the name of the community; Mommsen, who accepts Degenkolb's view (*loc. cit.*), holds that the law of emtio venditio also had its starting-point in public contracts of a similar nature.

hire, on the other hand, the money need not, on principle, be paid till the other party has performed his part. For in a sale bona fides requires that, in case of doubt, both parties should do what they promised to do simultaneously; in a case of hire, however, bona fides requires that the party who has agreed to let out the use of a thing, or to supply labour, or the result of labour, should first perform his part of the contract. § 69.

pr. I. de locat. et conduct. (3, 24): Locatio et conductio proxima est emptioni et venditioni, iisdemque juris regulis consistunt. Nam, ut emptio et venditio ita contrahitur, si de pretio convenerit, sic etiam locatio et conductio ita contrahi intellegitur, si merces constituta sit; et competit locatori quidem locati actio, conductori vero conducti.

3. Societas, or Partnership.

Societas is a contract whereby two or more persons bind themselves to the mutual performance of certain acts with a view to a common purpose, e. g. to carry on a business or make a journey in common [2]. Societas is a negotium bonae fidei. Both parties are mutually bound to do not only what they promised, but whatever is involved in the requirements of bona fides. Thus among other duties socii must exercise diligentia, but only the diligentia quam suis rebus adhibere solet (scil. socius). A socius cannot be required to exercise a higher degree of care in partnership matters than he does in his own affairs. It is a man's own fault if he chooses a careless socius. Bona fides further requires that the contract of societas shall be terminable by notice at any moment, unless indeed a definite time has been agreed upon during which the socii waive their right to give notice of withdrawal. If a socius gives notice without justification, i. e. either contrary to express agreement or contrary to good faith, the societas, it is true, is dissolved by the notice, but the partner thus withdrawing is bound to compensate his

[2] A mere agreement to make a journey in common does not, in itself, constitute a societas. It only becomes a societas if the parties mutually promise one another certain acts with a view to this particular purpose, in other words, if the journey is undertaken at the joint expense.

§ 69. socii. Every partner has the actio pro socio against the other partners.

pr. I. de soc. (3, 25): Societatem coire solemus aut totorum bonorum, quam Graeci specialiter κοινοπραξίαν appellant, aut unius alicujus negotiationis, veluti mancipiorum emendorum vendendorumque, aut olei, vini, frumenti emendi vendendique.

§ 1 eod.: Et quidem, si nihil de partibus lucri et damni nominatim convenerit, aequales scilicet partes et in lucro et in damno spectantur. Quod si expressae fuerint partes, hae servari debent.

4. Mandatum.

Mandatum is a contract whereby one party agrees to execute gratuitously a commission received from the other. It is a negotium bonae fidei, and therefore binds both parties to do all that is required by bona fides [3]. Thus the mandatary must execute his commission and—though he derives no benefit from the contract—he must show omnis diligentia, failing which he is liable to pay damages. On the other hand, the mandator is bound to recoup the mandatary for expenses incurred and, generally speaking, to show omnis diligentia. The mandatary (i. e. the person who receives the commission) is the party who is primarily and in all cases liable. Hence the action in which he is sued by the mandator is called the actio mandati directa. The mandator (i. e. the person who gives the commission) only incurs a liability in particular circumstances. The mandatary's action against the mandator is called the actio mandati contraria.

The commission *may* be coupled with the grant of plenary authority, i. e. with the grant of a power to act in the name of the mandator, for example, to conclude a juristic act or to conduct a lawsuit in his name. In such a case the mandatary is authorized, at the same time, to act as the mandator's representative (sup. p. 144 ff.).

From a mandatum—where the object is to place the mandatary under an obligation to execute his commission—we must distinguish

[3] As to the legal history of the obligation in societas and mandatum, v. A. Pernice in the *Sitzungsberichte der Berliner Akademie*, vol. li. pp. 1195, 1196. It originated perhaps in the jus sacrum.

mere advice (the so-called 'mandatum tua gratia'), which does not aim at the creation of any such obligation, and is therefore neither a mandatum nor even a juristic act at all. A mandatum under which a person is commissioned to do an act contra bonos mores is void, because no obligation whatever to do an immoral act can be created by legal means, neither by a negotium stricti juris nor by a negotium bonae fidei. § 69.

§ 7 I. de mand. (3, 26): Illud mandatum non est obligatorium, quod contra bonos mores est, veluti si Titius de furto, aut de damno faciendo, aut de injuria facienda tibi mandet. Licet enim poenam istius facti nomine praestiteris, non tamen ullam habes adversus Titium actionem.

§ 13 eod.: In summa sciendum est, mandatum, nisi gratuitum sit, in aliam formam negotii cadere. Nam, mercede constituta, incipit locatio et conductio esse.

§ 70. *Quasi-Contracts.*

Where the facts of a case merely resemble a contract, but nevertheless produce the same effect as a contract, we have a Quasi-Contract. The following are examples of quasi-contracts:— § 70.

I. Enrichment sine causa and ex injusta causa.

Where A is enriched at the expense of B under circumstances which are either not sanctioned by, or are even opposed to, the policy of the law, we have, in the first case, an enrichment *sine causa*, in the second case, an enrichment *ex injusta causa*. The person who is enriched under such circumstances (A) is under an obligation to restore the amount by which he was enriched. The person at whose expense A was enriched can proceed against A by condictio.

a. Cases of enrichment sine causa.

1. Solutio indebiti.

Solutio indebiti means the erroneous payment of money which is not owed. The person thus paying by mistake can sue for the recovery of the money by condictio indebiti.

2. Dare ob causam.

Dare ob causam means the making over of property by one person (A) to another (B) in anticipation of some future event agreed

§ 70. upon between them, e. g. in anticipation of B's marrying C. Until the contemplated event has taken place, or if, for some reason, its occurrence has become clearly impossible, there is, in the eye of the law, no sufficient consideration for the enrichment of B. A can therefore compel him by the condictio ob causam datorum, or, as it is also called, the condictio causa data causa non secuta, to restore the amount by which he was enriched. On the same principle a person, who, under an innominate real contract—a contract of exchange (p. 294)—has performed his part, may always in Roman law avail himself of this action for the purpose of recovering what he gave. In other words, he has the choice between two remedies: he may sue either on the innominate real contract and claim counter-performance by the actio praescriptis verbis, or he may sue on the quasi-contract by the condictio causa data causa non secuta (unless counter-performance has actually taken place), and claim restoration of the amount by which the defendant was enriched. The right of the plaintiff to proceed in the second way is called the jus poenitendi[1].

3. Cases where 'dare' fails to take effect.

Under this heading we include cases where A makes over property to B, intending thereby to produce a legal result (e. g. to create a loan), but failing for some reason to do so. The reason may be, for instance, that there is no corresponding intention on the part of B, B thinking, perhaps, that the money paid to him was intended as a gift. In such cases A cannot indeed sue B on a contract of loan, but he may proceed by condictio sine causa for the recovery of the amount by which B was enriched. The same principle applies, where A, intending to give B a loan, gives him coins which are not his (A's), the effect being that B does not become owner of the coins by traditio, but only by consumption, i. e. by the mixture of the money which is not

[1] It would seem that the compilers were the first to introduce the 'condictio propter poenitentiam' into Roman law. It was probably intended to take the place of the actio fiduciae, which was available for the purpose of compelling a person who had received a thing subject to a trust, under a mancipatio (or in jure cessio) fiduciae causa (in other words, under a fiducia cum amico contracta, sup. p. 34), not only to carry out the trust, but also to restore the thing. Cp. Gradenwitz, *Interpolationen*, p. 146 ff.; Lenel, *ZS. d. Sav. St.* vol. ix. p. 182.

his with money of his own (sup. p. 227). And the same condictio sine causa is available, generally speaking, in all cases where one person receives something which ought to have been received by another. For example: A sells a thing which was bequeathed to B; the thing is destroyed; B cannot therefore proceed by rei vindicatio, but he can sue A (the vendor) by the condictio sine causa for the amount realized by the sale. The object, then, of the condictio sine causa is, broadly speaking, to rescind any transaction whereby a person is erroneously enriched, provided always the equitable claim of the plaintiff is not counteracted by an equitable defence on the part of the defendant. § 70.

b. Cases of enrichment ex injusta causa.

1. Theft.

The possession of stolen property enriches the thief at the expense of the owner, in a manner contrary to the law[2]. The owner can compel the thief, by the condictio furtiva, to restore the property or pay him damages.

2. Dare ob turpem causam.

Dare ob turpem causam means the making over of property under circumstances which render its acceptance immoral. The person giving the property can redemand it by the condictio ob turpem causam, provided always the giving itself was not also immoral.

3. Dare ex injusta causa.

Dare ex injusta causa means the paying of a debt discountenanced by the law, e. g. the paying of interest at a usurious rate. And the term is applied, in a general way, to all cases where one person is enriched at the expense of another in a manner which the law regards as unjust, as, for example, when a malae fidei possessor is enriched at the expense of the owner. In all such cases the person enriched is compellable by the condictio ex injusta causa to restore the amount by which he was enriched.

[2] Roman law even assumes that the thief is enriched by acquiring ownership in the stolen property. Hence he is required by the condictio furtiva to rem *dare*, i. e. to make the plaintiff owner again, notwithstanding the fact that the plaintiff of course never lost his ownership in spite of the theft. For an historical explanation of this rule v. Jhering, in his *Jahrbücher f. Dogmatik*, vol. xxiii. p. 205, note.

§ 70. L. 1 § 1 D. de condictione indebiti (12, 6) (Ulpian.): Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio.

L. 7 § 1 D. de condictione causa data causa non secuta (12, 4) (Julian.): Fundus dotis nomine traditus, si nuptiae insecutae non fuerint, condictione repeti protest: fructus quoque condici poterunt.

L. 1 § 2 D. de condictione ob turpem vel injustam causam (12, 5) (Paulus): Quod si turpis causa accipientis fuerit, etiam si res secuta sit, repeti potest. L. 2 cod. (Ulpian.): Utputa dedi tibi, ne sacrilegium facias, ne furtum, ne hominem occidas.

II. Receptum nautarum, cauponum, stabulariorum.

A shipowner, innkeeper, or stablekeeper, who takes charge of property belonging to a traveller is answerable for such property in like manner as though he had concluded an express contract to that effect. This obligation was first introduced by the praetor. If the property in question is lost or injured, the traveller can sue for full damages by the actio de recepto, unless, indeed, the defendant (the shipowner, &c.) can prove that the loss was caused by the traveller's own negligence or by an unavoidable accident (vis major).

L. 1 pr. D. nautae caup. (4, 9): Ait praetor: Nautae, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo.

III. Negotiorum gestio.

Negotiorum gestio occurs where A, *without* previous authority, manages B's affairs, as, for example, where I conduct a lawsuit for a friend who is absent, or take charge of his property, or pay his debts. Such acts give rise to a relationship similar to mandatum. A liability rests in the first instance, and in all cases, on the negotiorum gestor, for he is bound to carry out the matter he has undertaken with omnis diligentia. The person whose affairs he is managing (i. e. the principal, the dominus negotii) has the actio negotiorum gestorum directa. It is only in certain circumstances that the dominus negotii incurs a liability, e. g. to indemnify the negotiorum gestor for

expenses. In such cases the negotiorum gestor has the actio negotiorum gestorum contraria against the principal. § 70.

§ 1 I. de obl. quasi ex contr. (3, 27): Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum; sed domino quidem rei gestae adversus eum, qui gessit, directa competit actio, negotiorum autem gestori contraria. Quas ex nullo contractu proprie nasci, manifestum est; quippe ita nascuntur istae actiones, si sine mandato quisque alienis negotiis gerendis se optulerit: ex qua causa ii, quorum negotia gesta fuerint, etiam ignorantes obligantur. Idque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia, quae sane nemo curaturus esset, si de eo, quod quis impendisset, nullam habiturus esset actionem.

IV. Tutela.

As soon as a guardian enters upon his duties, there arises between him and his ward a relationship similar to mandatum. A liability rests in all cases on the guardian, for he is bound to show care in the management of his guardianship. But since his acceptance of the guardianship is compulsory, he is only liable for failure to show the diligentia quam suis rebus adhibere solet. The ward's remedy against his guardian is the actio tutelae directa. It is only in certain circumstances that a liability attaches to the ward, viz. when the guardian has incurred any outlay. The guardian sues his ward by the actio tutelae contraria.

§ 2 I. eod.: Tutores quoque, qui tutelae judicio tenentur, non proprie ex contractu obligati intelleguntur (nullum enim negotium inter tutorem et pupillum contrahitur); sed quia sane non ex maleficio tenentur, quasi ex contractu teneri videntur.

V. Communio.

Communio, or community of property, gives rise, as between the co-proprietors, to a relationship similar to societas. The rights of the parties inter se are as follows: (1) Either party can claim a

§ 70. partition from the other. If the thing is divisible, it is physically divided; if it is indivisible, one party is awarded the whole, subject to an obligation to compensate the other. (2) Either party can claim to be indemnified for expenses necessarily incurred on behalf of the other. (3) Either party is bound to show the diligentia quam suis rebus, i.e. he is bound to treat the common property with the same care as he would his own, with the alternative of paying damages. There are three kinds of communio, according as the parties share the same property, the same inheritance, or the same boundaries, the last of which cases occurs where the true boundaries are no longer ascertainable. Corresponding to these three kinds of communio there are three partition suits ('judicia divisoria'). Where common property is to be divided, the actio communi dividundo applies; where a common inheritance is to be divided, the actio familiae erciscundae; where common boundaries are concerned, the actio finium regundorum. By means of a judicium divisorium the plaintiff can assert not only his right to a partition, but also his right to 'praestationes personales,' i. e. to indemnification for expenses and to compensation for damages. So far, however, as a partition suit aims at a division, it belongs to the so-called 'judicia duplicia' (sup. p. 255), both parties sustaining the same *rôle* in the suit, and the adjudicatio (or condemnatio, as the case may be) binding both parties to do whatever is necessary for the purpose of effecting the partition.

> § 3 I. eod.: Item, si inter aliquos communis sit res sine societate, veluti quod pariter eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo judicio, quod solus fructus ex ea re perceperit, aut quod socius ejus in eam rem necessarias impensas fecerit: non intellegitur proprie ex contractu obligatus esse, quippe nihil inter se contraxerunt; sed, quia non ex maleficio tenetur, quasi ex contractu teneri videtur.

VI. The heir, by entering on his inheritance, incurs a quasi-contractual obligation to pay over to the legatees all such legacies as he has been validly charged with by the testator.

§ 5 I. eod.: Heres quoque legatorum nomine non proprie ex contractu obligatus intellegitur. Neque enim cum herede neque cum defuncto ullum negotium legatarius gessisse proprie dici potest. Et tamen, quia ex maleficio non est obligatus heres, quasi ex contractu debere intellegitur. § 70.

§ 71. *Pacts.*

A pact (pactum) is an informal declaration of consensus; for example, an informal release, an informal compromise. An obligatory pact is an informal obligatory declaration of consensus which the Roman civil law refused to acknowledge as a contract. The principle applied in such cases is that a pact (a so-called 'nudum pactum') gives rise, not to an actionable obligation, but only to a so-called 'naturalis obligatio,' i. e. to an obligation which, though payment can be validly made under it, is not enforceable by action. In other words, if the debtor, of his own accord, fulfils his informal promise, well and good; he cannot recover the money he has paid by means of a condictio indebiti (sup. p. 315). But, on the other hand, he cannot be *compelled* to pay by actio. The only way in which a pact can be given effect to, is by means of an exceptio in cases where a person, on being sued, can plead the conclusion of such an informal agreement by way of defence [1]. § 71.

Nevertheless there are certain pacts—called the 'pacta vestita'—which are enforceable by action. Of these some are actionable even according to the classical civil law; others are actionable by the praetorian law; and a third class by the later civil law (the imperial law).

I. According to the classical civil law, and consistently with the general ideas inherent in this law, the so-called 'pacta adjecta' are actionable. Pacta adjecta are collateral agreements which are added immediately (ex continenti) on the conclusion of a negotium

[1] It should be noticed that the non-observance of the requirements of a formal contract does not in itself convert the transaction into a valid pact. If the parties intended to conclude a formal contract, but failed to satisfy the necessary requirements of form, the result is, in case of doubt, not an informal agreement (which the parties never contemplated), but no agreement at all; cp. l. 1 § 2 D. de verb. obl. (45, 1). It is a mistake to take this passage as proving that a nudum pactum did not give rise to a natural obligation.

§ 71. bonae fidei. Thus, if the parties to a contract of sale agree that, in default of punctual performance, the defaulting party shall pay a specified penalty, such penalty is recoverable by the action on the *sale*. A stipulatio to that effect is not needed. Every negotium bonae fidei binds the parties to do all that is required by bona fides. The good faith, therefore, on which the principal agreement is based, necessarily carries with it the duty to fulfil whatever was promised in the collateral agreement which was simultaneously concluded. If, however, the collateral agreement is concluded subsequently to the principal agreement, it cannot be enforced by the action on the principal agreement (of which, in such a case, it does not form an integral part), and not being actionable for its own sake, it gives rise, not to an actio, but only to an exceptio.

II. According to the praetorian law (pactum praetorium), the so-called 'constitutum debiti' is actionable. A constitutum debiti is a promise to pay a subsisting debt, whether it be one's own (constitutum debiti proprii) or another's (constitutum debiti alieni). Such a promise, if given in the form of a stipulatio, was actionable by the civil law. The praetor, however, made it actionable, even when unaccompanied by any formalities. (The actio de pecunia constituta —which was the appropriate remedy—was originally only granted on the ground of a constitutum for a money debt, and only for pecunia credita, the term 'constitutum' signifying, in the old times, the informal fixing of a day for the repayment of money which was owed.) Thus a person might promise by constitutum to pay another's debt, and, if he did so, his liability was even more stringent than that of a surety. For it was not every extinction of the principal debt that operated his release, but only payment to, or material satisfaction of, the creditor. The constituens and the principal debtor were not, as in the case of fidejussio, correal, but merely solidary debtors (sup. p. 282).

III. According to the later imperial law (pacta legitima) a promise of bounty and a promise to give a dos (inf. § 82) are actionable as mere informal pacts. But in the absence of a judicial insinuatio a promise of bounty is only binding to the extent of 500 solidi (sup. p. 138).

§ 71. L. 7 § 7 D. de pact. (2, 14): Ait praetor: PACTA CONVENTA, QUAE NEQUE DOLO MALO, NEQUE ADVERSUS LEGES, PLEBISCITA, SENATUSCONSULTA, EDICTA, DECRETA PRINCIPUM, NEQUE QUO FRAUS CUI EORUM FIAT, FACTA ERUNT, SERVABO.

L. 13 C. de pact. (2, 3) (MAXIMINUS): In bonae fidei contractibus ita demum ex pacto actio competit, si ex continenti fiat. Nam, quod postea placuit, id non petitionem, sed exceptionem parit.

§ 9 I. de act. (4, 6): De pecunia autem constituta cum omnibus agetur, quicumque vel pro se vel pro alio solvturos se constituerint, nulla scilicet stipulatione interposita; nam alioquin, si stipulanti promiserint, jure civili tenentur.

B. DELICTUAL OBLIGATIONS.

§ 72. *The Private Delicts of Roman Law.*

§ 72. In Roman law there are a number of delicts against which provision is made by remedies belonging to the private law. These are the so-called private delicts. Private delicts give rise to obligations which the injured party may enforce in order to punish the delinquent, the obligation being either one to pay damages (actio rei persequendae causa comparata, cp. sup. p. 188), or to pay a penalty (actio poenalis), or to pay both damages and a penalty (actio mixta). The private delicts of Roman law are as follows:—

1. Furtum.

Furtum is the secret and wilfully wrongful appropriation of a movable thing not one's own, whether such appropriation is coupled with actual removal of the thing from the custody of another or not[1]. Theft gives rise to two actions. Firstly, the actio furti which is penal—the penalty being quadruplum in the case of a fur manifestus (i. e. a thief who is caught in the act, though it is enough

[1] According to the civil law secrecy is not essential to the conception of theft. At civil law therefore theft means *any* wilfully wrongful appropriation, including also rapina. It was only the praetorian law that distinguished rapina from furtum.

§ 72. if he is seen in the commission of it), and duplum in the case of a fur nec manifestus. Secondly, the condictio furtiva which is reparatory (sup. p. 317). The actio furti can be brought by any person who is injured by the theft (cujus interest rem non subripi, rem salvam esse). On the other hand, the condictio furtiva to recover damages for a stolen thing can only be brought by the owner of the thing.

In the earlier Roman law there was also an 'actio furti concepti' against persons on whose premises stolen property was discovered after a formal search; an 'actio furti oblati' against persons who concealed stolen property on the premises of another; an 'actio furti prohibiti' against persons who resisted a search; an 'actio furti non exhibiti' against persons who refused to give up stolen property found after a search on their premises. All these actions were associated with the ancient right of a person whose property had been stolen to enter any house for the purpose of conducting a formal search with certain prescribed ceremonies. When this right of private search fell into disuse, the different actions which were associated with it ceased likewise to be employed.

The definition given above is only applicable to thefts of the thing itself (furtum rei ipsius). In Roman law there is also a 'furtum possessionis,' which is committed by the owner of a thing who abstracts such thing from a person entitled to the possession of it, e. g. a pledgee; and a 'furtum usus,' i. e. an appropriation for mere temporary use. The same remedies are applicable to these cases, viz. the condictio furtiva, in which the plaintiff claims the possession or the usus, and the actio furti, in which the plaintiff claims as damages the double or fourfold value of the possessio or usus.

L. 1 § 3 D. de furtis (47, 2) (Paulus): Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus ejus possessionisve.

§ 3 I. de obligat. ex del. (4, 1): Furtorum autem genera duo sunt, manifestum et nec manifestum.—Manifestus fur est, quem Graeci ἐπ' αὐτοφώρῳ appellant, nec solum is, qui in ipso furto deprehenditur, sed etiam is, qui eo loco deprehenditur,

quo fit . . . Immo ulterius furtum manifestum extendendum est, quamdiu eam rem fur tenens visus vel deprehensus fuerit, sive in publico, sive in privato, vel a domino, vel ab alio, antequam eo perveniret, quo perferre ac deponere rem destinasset. Sed si pertulit, quo destinavit, tametsi deprehendatur cum re furtiva, non est manifestus fur. Nec manifestum furtum quid sit, ex his quae diximus intellegitur. Nam quod manifestum non est, id scilicet nec manifestum est. § 72.

§ 13 eod.: Furti autem actio ei competit, cujus interest, rem salvam esse, licet dominus non sit; itaque nec domino aliter competit, quam si ejus intersit rem non perire.

§ 19 eod.: Furti actio, sive dupli, sive quadrupli, tantum ad poenae persecutionem pertinet. Nam ipsius rei persecutionem extrinsecus habet dominus, quam aut vindicando aut condicendo potest auferre. Sed vindicatio quidem adversus possessorem est, sive fur ipse possidet, sive alius quilibet; condictio autem adversus ipsum furem heredemve ejus, licet non possideat, competit.

2. Rapina.

Rapina is the taking away of a thing by violent means. It gives rise to the praetorian actio vi bonorum raptorum, in which the plaintiff claims quadruplum, a simplum being counted as damages. The actio vi bonorum raptorum is thus an actio mixta. After the lapse of an annus utilis (sup. p. 207) the plaintiff can only recover simple damages. The action is open to any one who is injured by the robbery.

[L. 2 pr. D. vi bon. rapt. (47, 8):] Praetor ait: SI CUI VI, DOLO MALO, HOMINIBUS ARMATIS COACTISVE, DAMNI QUID FACTUM ESSE DICETUR, SIVE CUJUS BONA RAPTA ESSE DICENTUR, IN EUM, QUI ID FECISSE DICETUR, IN ANNO, QUO PRIMUM DE EA RE EXPERIUNDI POTESTAS FUERIT, IN QUADRUPLUM, POST ANNUM IN SIMPLUM JUDICIUM RECUPERATORIUM DABO [2].

pr. I. de vi bon. rapt. (4, 2): Qui res alienas rapit, tenetur quidem etiam furti. Quis enim magis alienam rem invito domino contrectat, quam qui vi rapit? Ideoque recte

[2] The above passage from the edict is given in the form as supplemented by Lenel (*Edictum*, p. 316).

§ 72. dictum est, eum improbum furem esse. Sed tamen propriam actionem ejus delicti nomine praetor introduxit, quae appellatur vi bonorum raptorum, et est intra annum quadrupli, post annum simpli. Quae actio utilis est, etiamsi quis unam rem licet minimam rapuerit. Quadruplum autem non totum poena est et extra poenam rei persecutio, sicut in actione furti manifesti dicimus, sed in quadruplo inest et rei persecutio, ut poena tripli sit, sive comprehendatur raptor in ipso delicto, sive non.

3. Damnum injuria datum.

Damnum injuria datum means wilful or negligent damage to corporeal property. The owner whose property is damaged can claim full compensation by the actio legis Aquiliae. When the damage consists in the killing of a slave, or the killing of any quadruped included under the name of cattle (quadrupedes, quae pecudum numero sunt et gregatim habentur, veluti oves, caprae, boves, equi, asini, muli ;—canis inter pecudes non est, l. 2 § 2 D. 9, 2), the defendant must pay the highest value of such slave or quadruped within the year immediately preceding[3]; when the damage consists in any other injury to corporeal things, he must pay the highest value of such property within the month immediately preceding[4]. Thus the actio legis Aquiliae is an actio rei persequendae causa, but the peculiar manner in which the damages are assessed imports a penal element into it. The same may be said of the rule that if the defendant in the actio legis Aquiliae (i. e. the perpetrator of the damage) denies his liability and judgment goes against him, he must pay double damages (lis infitiando crescit in duplum). By virtue of the wording of the lex Aquilia (damnas esto)

[3] This is provided by the first chapter of the lex Aquilia.

[4] The third chapter of the lex Aquilia dealt with 'ceterae res' and mere *injuries* to slaves and cattle. The second chapter was concerned with adstipulatores (sup. p. 303), who abused the formal rights they acquired for the purpose of releasing a debtor by acceptilatio (inf. § 76). This chapter of the lex Aquilia fell into disuse, because the recognition by the civil law of the obligation created by mandatum (sup. p. 314) enabled the injured party to sue the fraudulent adstipulator by the actio mandati directa for full damages, the delictual action on the lex Aquilia thus becoming superfluous.—The Twelve Tables only contained a provision with regard to damage to property by *rumpere* (rupitiae), and imposed on the delinquent the duty to repair (sarcire) the thing broken, with the alternative of compensating the plaintiff by another thing of equal value.

the defendant stands already condemned to the same extent as though a valid judgment had been pronounced against him. If he, therefore, by vexatiously denying his liability, compelled the plaintiff to prove the delict, he was treated in just the same manner as though he had knowingly evaded compliance with a lawful judgment, i. e. he was condemned in duplum. (Cp. sup. p. 158.) § 72.

The actio legis Aquiliae does not apply, unless the damage is imputable to the defendant, whether he be guilty of dolus or merely of culpa levis. In order, however, to give rise to the delict contemplated by the lex, there must be culpa levis *in faciendo* on the part of the defendant. Non facere, as such, is not a delict—though there are circumstances in which a mere forbearance (non facere) may be equivalent to an act (facere), in which case the *act* may be a delict. It is a further requirement that the wrongful act of the defendant shall have resulted in damage to a definite corporeal thing belonging to the plaintiff. The actio legis Aquiliae is not available on the ground of a mere injury to property, in the wider sense of an aggregate of proprietary rights and liabilities (inf. under 5). The words of the lex Aquilia required that the damage to the thing should be caused *directly* by the act of the defendant (damnum corpore corpori datum)[5]. Subsequently, however, the praetor extended the actio legis Aquiliae, in the shape of an actio utilis (sup. p. 181), to cases where the damage to the thing was merely the indirect result of the act of the defendant. For example: A cuts the cable by which B's ship is moored so that the ship drifts out to sea and is lost; the actio legis Aquiliae directa would only enable the plaintiff to recover the value of the cable; the actio legis Aquiliae utilis, however, entitles him to damages for the loss of the ship. In certain cases the praetor even granted an actio in factum after the pattern of the lex Aquilia (accommodata legi Aquiliae), in cases namely where there was not, properly speaking, any damage to a thing, but where the plaintiff was deprived of a thing in such a way as to make it tantamount to a destruction of the thing. For example: A takes the

[5] In chapter i. of the lex Aquilia (servus, pecudes) the words used were 'injuria occidere,' in chapter iii. (ceterae res praeter hominem et pecudem occisos) they were 'injuria urere, frangere, rumpere'; in either case the statute referred to damage to property caused by direct physical contact.

§ 72. chains off B's slave and the slave escapes; or A throws B's ring into the sea.

pr. I. de leg. Aq. (4, 3): Damni injuriae actio constituitur per legem Aquiliam. Cujus primo capite cautum est, ut, si quis hominem alienum, alienamve quadrupedem, quae pecudum numero sit, injuria occiderit, quanti ea res in eo anno plurimi fuit, tantum domino dare damnetur.

§ 2 eod.: Injuria autem occidere intellegitur, qui nullo jure occidit. Itaque qui latronem occidit, non tenetur, utique si aliter periculum effugere non potest. § 3: Ac ne is quidem hac lege tenetur, qui casu occidit, si modo culpa ejus nulla invenitur. Nam alioquin non minus ex dolo quam ex culpa quisque hac lege tenetur.

§ 12–14 eod.: Caput secundum legis Aquiliae in usu non est. Capite tertio de omni cetero damno cavetur.—Hoc tamen capite non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is, qui damnum dederit.

§ 16 eod.: Ceterum placuit, ita demum ex hac lege actionem esse, si quis praecipue corpore suo damnum dederit. Ideoque in eum, qui alio modo damnum dederit, utiles actiones dari solent, veluti si quis hominem alienum aut pecus ita incluserit, ut fame necaretur. . . Sed si non corpore damnum fuerit datum, neque corpus laesum fuerit, sed alio modo damnum alicui contigit, cum non sufficit neque directa, neque utilis Aquilia, placuit eum qui obnoxius fuerit in factum actione teneri; veluti si quis, misericordia ductus, alienum servum compeditum solverit, ut fugeret.

4. Injuria.

Injuria, or insult, means any wilful disregard of another's personality. The Twelve Tables contained the following provisions on the subject of injuria: public slander was visited with capital punishment, bodily mutilation (membrum ruptum) with talio, other injuriae with a fixed fine (mostly 25 asses). These provisions were superseded by the praetorian actio injuriarum aestimatoria (available intra annum utilem), in which the plaintiff demanded a fine proportionate to the insult, subject, however, to the right of the judge to reduce the amount demanded. The conception of injuria as developed by

Roman jurisprudence was a very comprehensive one, the result being that the actio injuriarum, supplementing the remaining legal remedies, came to be available in all cases where the defendant could be charged with any intentional violation of a person's right, i. e. any violation which was deliberately designed to injure the personality of another. In other words, what had at first been the remedy for a person whose reputation had been disparaged, came to be adopted as a general remedy in all cases of a vexatious violation of his rights[6]. A lex Cornelia of the year 81 B.C. granted a civil action for the recovery of a penalty (the defendant being at the same time threatened with public punishment) in certain cases of bodily injuries, viz. in cases of verberare, pulsare, domum vi introire. § 72.

The actio injuriarum is a so-called 'actio vindictam spirans,' i. e. its object is to give the plaintiff personal satisfaction. Hence it is not actively transmissible, i. e. the right of action is confined to the outraged person himself and does not pass to his heirs till after litis contestatio has taken place. Since its effect is moreover to impose a penalty, it is an actio poenalis and, as such, is also passively untransmissible.

§ 1 I. de injur. (4, 4): Injuria autem committitur non solum, cum quis pugno puta aut fustibus caesus vel etiam verberatus erit, sed etiam si cui convicium factum fuerit, sive cujus bona, quasi debitoris, possessa fuerint ab eo qui intellegebat nihil eum sibi debere, vel si quis ad infamiam alicujus libellum aut carmen scripserit, composuerit, ediderit, dolore malo fecerit, quo quid eorum fieret, sive quis matremfamilias aut praetextatum praetextatamve adsectatus fuerit, sive cujus pudicitia attentata esse dicetur; et denique aliis pluribus modis admitti injuriam manifestum est.

5. Dolus and Metus.

Dolus (i.e. any wilful act whereby damage is done to the property of another, taking the term property in its widest sense), and metus (i.e. any threat by which damage is done to the property of another) render the delinquent liable to pay full compensation, the

[6] See, on this subject, Jhering in his *Jahrbücher für Dogmatik*, vol. xxiii. p. 155 ff.: *Rechtsschutz gegen injuriöse Rechtsverletzungen*. — Landsberg, *Injuria und Beleidigung* (1886).

§ 72. appropriate remedies being the actio de dolo and actio quod metus causa respectively (sup. pp. 135, 136). With regard to the actio de dolo, however, since it entails infamy on the party condemned, it is only granted in a subsidiary way, when no other remedies are available (si qua alia actio non erit); and after the lapse of two years, according to Justinian's law—post annum utilem, according to the praetorian law—it can only be taken in the shape of an actio in factum to the extent to which the defendant has still any profit from his dolus. A threat which results in damage to the property of another being really only a special case of dolus, it follows that, generally speaking, in cases of dolus the mere damage to the property in itself gives rise to an action for compensation, whereas in cases of mere culpa, i. e. in cases of damage for which, though it is unintentional, the defendant is nevertheless answerable, no action arises, unless the damage is done to a corporeal thing (sup. under 3). This rule, which is true both of Roman law and the common law of modern Germany, is one of the greatest practical importance.

§ 73. *Quasi-Delicts.*

§ 73. When the facts of a case merely resemble a delict, but nevertheless produce the same effect as a delict (viz. an obligation to pay damages or a penalty), we have a quasi-delict.

1. Judex qui litem suam facit, i.e. a judge (in the formulary procedure, the sworn judex) by whose act or default in deciding or conducting a lawsuit, a party to such suit is injured, is liable to an action for damages, the amount of which is left to the discretion of the judge (quantum aequum judici videbitur). Such an action is regarded as *quasi*-delictual, because it is available not only in cases of deliberately unfair decisions, but also in cases of less serious errors committed by the judge, if he, for example, overlooks the day fixed for trial, or disregards the rules of law concerning adjournment, and so forth (imprudentia judicis). It would, however, be quite wrong to suppose that the action in question could be taken on the ground that the judgment was unjust in substance[1].

[1] Cp. Lenel, *Edictum*, pp. 136, 137.

2. Where something is thrown or poured out of a room to the injury of another, the occupier, or occupiers, of such room are liable to the praetorian actio de effusis vel dejectis in which the plaintiff claims double damages (i.e. it is an actio mixta). § 73.

3. A person who places or hangs something over a public way to the common danger of all, is liable to a praetorian actio popularis (cuivis ex populo, cp. p. 188) for the recovery of a private penalty of 10,000 sesterces, for which Justinian substituted 10 gold solidi. This is the actio de posito vel suspenso.

4. Shipowners (nautae), innkeepers (caupones), and stable-keepers (stabularii) are answerable by the praetorian law for delicts committed by their servants while acting within the scope of their employment. The injured party has an actio in factum for the recovery of double damages (i.e. an actio mixta).

5. The delict of a slave (unlike his contract, § 75 I) renders the master liable to a noxal action, i.e. the action ex delicto, to which the act of the slave gives rise, may be taken against the master in the shape of a noxal action. The master has the alternative of either taking the consequences of the delict upon himself or of surrendering the slave to the injured party (noxae dare). Cp. sup. pp. 191, 194. The same rule applies when an animal causes damage in a manner which is contrary to its natural disposition (contra naturam). The owner is liable to a noxal action in the shape of the so-called 'actio de pauperie.' Under the law prior to Justinian a paterfamilias could also be sued by noxal action for the delicts of the filiusfamilias[2].

[2] The history of noxae deditio and its probable connection with the ancient law of retaliation is discussed by Girard, *Les actions noxales*, Nouvelle revue historique de droit français et étranger, 1888.

III. Transfer and Extinction of Obligations.

§ 74. *Transfer of Obligations.*

§ 74. According to the Roman civil law, the creditor in an obligation cannot transfer ('assign') his right to another. True, he may constitute the other his procurator, or 'processual agent,' for purposes of the action (mandatum actionis), i.e. he may commission the other to sue as his agent for the amount which is due under the obligation, and may further agree to let such agent retain the sum recovered in the action (mandatum in rem suam). But even a processual agent, invested with a mandatum actionis in his own favour (in rem suam), cannot sue in his own right, but only as the representative of another, viz. the principal from whom he derives his commission. In theory, the agent is not *entitled* to sue for the debt, but, like any other mandatarius, is merely *bound* to sue for it. If the creditor revokes his commission, or if he dies, the mandatum in rem suam is extinguished like any other mandatum. The mandatarius in rem suam has no right in respect of the debt he sues for. In the eye of the law he is not the creditor, but only the creditor's agent. It is not till he has joined issue with the debtor (litis contestatio) that his relation to the debt becomes defined. Whenever a procurator appears as a party to an action, the formula is granted—and in the classical procedure it is by means of the formula that the litis contestatio is accomplished (sup. p. 150, n. 2)—in favour of, or, if the procurator represents the defendant, against, such procurator. In other words, whilst the intentio of the formula contains the name of the creditor, or debtor, the condemnatio is given for, or against, the procurator. 'If the defendant owes the mandator (the creditor) 100 aurei, he shall be condemned to pay 100 aurei to the *procurator*.' The result is to constitute the procurator 'dominus litis,' i.e. to make him a party to the action, the effects of which, therefore, operate in his favour, or otherwise, as the case may be. According to the wording of the formula, the

judex is directed to condemn the debtor to pay the debt to the procurator. From this moment, then, the processual mandatum becomes irrevocable, but it does not matter whether it be a mandatum in rem suam or any other processual mandatum; for any processual agent becomes dominus litis by means of the formula. As regards its outward effect, a mandatum in rem suam is indistinguishable from an ordinary mandatum. As against the debtor, a mandatarius in rem suam is, like any other mandatarius, not a creditor, but merely a procurator, though, as against the mandator, he is not bound to hand over what he recovers in the action from the debtor[1]. § 74.

The civil law, however, in course of time advanced a step beyond this position. It gradually became a fixed rule that a mandatum in rem suam should be irrevocable, not from the moment of litis contestatio only, but from the moment when the mandatarius in rem suam gave the debtor notice of the fact that he had received his commission from the mandator. A clear distinction was thus established between a mandatum in rem suam and an ordinary processual mandatum. The latter was revocable up to the litis contestatio; the former was only revocable up to the moment of notice. From the moment he gave notice the mandatarius in rem suam had a *right* to claim that the debtor should pay him, and him alone. It is in this fact that we find the first indication of the idea of *assignment*. The mandatarius in rem suam did not indeed become creditor, but he acquired the right to stand in the place of the creditor. What passed to him was not indeed the personal claim itself, but the right to insist on the fulfilment of the personal claim of another.

This course of development was completed by the praetor. The effect of the action of the praetor was to render mandata in rem suam (where the mandatary merely stood in the position of a procurator) unnecessary. By the praetorian law it was immaterial whether the creditor appointed the other his agent for purposes of the action or not, and whether the processual mandatum were validly revoked (prior to notice having been given) or not. The only matter of im-

[1] For a more detailed account of the history of processual agency in Roman law, see F. Eisele, *Cognitur und Procuratur* (1881); M. Rümelin, *Zur Geschichte der Stellvertretung im röm. Civilprocess* (1886).

§ 74. portance in the praetorian law was the transaction by which the obligation was expressed to be assigned, i.e. the transaction—whether it were a sale, a gift, the creation of a dos, or any other—which was concluded in respect of the obligation and which manifested an intention to transfer such obligation. According to the praetorian law, the mandatum ad agendum, granted on the ground of the transaction by which the parties purported to transfer the obligation, was immaterial. The essential part was the transaction itself, in a word, the act of assignment. It was only the praetorian law that gave legal effect to an intention to transfer an obligation. The civil law merely recognized mandata, where the agent was authorised to assert the claim of *another* (viz. the mandator), and mandata of this kind became in certain circumstances irrevocable. The praetorian law, on the other hand, recognized assignments of obligations as such, by way of sale, gift, &c.—assignments (that is to say) under which the declaration of the intention to assign entitled the assignee to sue on the obligation in his own name, to sue, in a word, for a claim *of his own*. The praetorian law, unlike the civil law, recognized a singular succession to obligations.

The action which the praetor granted the assignee on the ground of an assignment, was an actio utilis, the name of the assignee thus appearing in the intentio itself[2]. Such an actio utilis was quite unaffected by the revocation or death of the creditor. It operated at once to make the assignee creditor in respect of the debt due under the obligation. It was, however, quite obvious that a debtor who, not having received notice of assignment, paid his original creditor what he owed, was, on equitable grounds, entitled to the benefit of such payment. Not till he received notice of a sufficiently definite kind could the debtor be bound by the assignment. The practical importance of notice thus remained the same. But instead of being the means which the new creditor had to adopt in order to acquire a right of his own, it became merely the means for excluding a right

[2] It is difficult to say what form the assignee's actio utilis took. It was clearly an actio ficticia. But what was the object of the fiction? Eisele (*Die actio utilis des Cessionars* (1887), p. 26, 40 ff.) conjectures that there was a fictitious delegation (si Titius Num. A°. delegavisset), but this view is justly objected to by Unger in Jhering's *Jahrbücher für Dogmatik*, vol. xxvi. p. 412.

on the part of the debtor, the right namely to pay his original creditor. § 74.

There is no assignment in the case of a novation (sup. p. 300), where a new obligation, in favour of a new creditor, is created by means of a new contract, in lieu of the former obligation. The practical effect of such a novation may be to assign an obligation, but in point of form, it is never an assignment. It means invariably, not the transfer of a prior obligation, but the substitution of a new obligation in place of an old one.

§ 75. *Liability for Debts Contracted by Another.*

I. Master and Slave. § 75.

The owner of a slave is liable to a noxal action for the delicts of his slave (sup. p. 331). Contracts made by a slave do not bind his master absolutely and in all circumstances, but only in the following cases: (1) if the master grants his slave a peculium; (2) if the contract is concluded by order (jussus) of the master.

1. Where the master grants his slave a peculium, i. e. where he hands over to the slave certain property with directions to manage it independently—the slave, for example, employing his peculium for the purpose of setting up some business on his own account—in any such case the master can be sued by the praetorian actio de peculio on any contract concluded by the slave—except where a gift was intended—and can be made liable to the extent of the peculium (peculio tenus). Since the peculium remains the property of the master (for the slave is incapable of acquiring property), the master's liability in such cases affects his own property (though only to the extent of the peculium), but the debts for which he is rendered liable are the contractual debts of his slave, i. e. the debts of *another*. The slave himself is bound 'naturaliter' by his contracts (p. 108). Whatever the slave owes his master (as, for example, when a slave, for purposes of his peculium, borrows money from his master and binds himself to repay it) diminishes the peculium, and, conversely, whatever the master owes the slave increases the peculium. Although, as between master and slave, there can be no civil law obligation, never-

§ 75. theless their mutual contracts and quasi-contracts operate to increase and diminish the peculium. Thus, if a slave makes a contract with a third party by which his master is benefited (if he, for example, borrows money which he converts to the use of his master, say, by paying his master's debts), he (the slave) is entitled—on the analogy of the actio negotiorum gestorum contraria—to be compensated by his master on account of such loan to the extent to which the master has been enriched by the transaction, to the extent, in other words, to which the master has been actually benefited by the loan. This claim to compensation against the master operates to increase the peculium pro tanto, so that in measuring the extent to which the master is liable to third parties suing him by the actio de peculio, the amount of such claim has to be taken into account. But creditors, with whom a slave concludes transactions beneficial to his master, are not confined to the actio de peculio. They may sue the master by the 'actio de in rem verso' and make him liable to the extent of his enrichment, i. e. so far as the transaction has actually benefited him, to the extent, in other words, of the claim for compensation which his slave has against him. And in this actio de in rem verso the master is not entitled to deduct any claims which he may have against his slave on other grounds.

If the peculium is given to the slave for the purpose of carrying on some mercantile business, the slave's commercial creditors can sue the master by the 'actio tributoria,' a kind of liquidation proceedings in which the creditors demand to have the merx peculiaris (i. e. the capital invested in the business) distributed among themselves in the proportion of their respective claims. The master is not entitled in this case to deduct the amount his slave owes him; he is only entitled to rank as an ordinary creditor and to receive, as such, a proportionate satisfaction of his claims.

2. If the slave in concluding a contract is acting under the orders (jussus) of his master, the master is liable to the creditor on an actio quod jussu for the whole amount (in solidum). The instructions need not be expressly given for the particular contract; general instructions are sufficient for the purpose. If a master makes his slave captain of a ship (magister navis), and thereby confers upon

him, in a general way, all the powers incident to the duties of a ship- § 75.
captain, as such, any third party contracting with the slave in his capacity of captain (e. g. for the carriage of goods) may sue the master (i. e. the owner of the ship, 'exercitor navis') by the actio exercitoria for the whole amount of his claim. Or again, if a master appoints his slave to act as his authorized representative in any other kind of business ('institor'), say, as a waiter or a clerk, any person contracting with the institor as such may sue the master by the actio institoria and render him liable—as in the former case—for the whole amount due under the contract.

II. Paterfamilias and Filiusfamilias.

A paterfamilias is liable on the contracts of his filiusfamilias in the same way in which a dominus is liable on the contracts of his slave. In some cases, therefore, his liability is restricted—for example, when he gives his son a peculium (profecticium, inf. § 88), or when the son concludes a contract benefiting his father—in others, it is unrestricted, for example, when the father authorizes his son to conclude some transaction, either in a general way or specifically. The actions by which a creditor can sue a paterfamilias on the contracts of the filiusfamilias are precisely the same as those by which he can sue a dominus on the contract of a slave.

III. Principal and Agent.

A principal is liable on all contracts made by his agent, i. e. by a free person whom the principal has chosen to represent him, provided only the agent, in concluding such contracts, discloses the fact of his agency, in other words, explicitly refers to the commission under which he is acting (sup. p. 146). The same actions by which a paterfamilias or dominus can be rendered liable for acts performed by the son or slave on the strength of a general authority bestowed upon them, are equally available where the person upon whom the authority is conferred is not subject to the power of another. Thus the actio exercitoria and institoria are equally applicable where a free person is appointed captain of a ship or manager of a business (institor). Wherever an authority—whether general or special—is conferred for any other purposes, wherever, that is to say, in the case of an unfree representative the actio quod jussu would lie, in all such

§ 75. cases, where the representative is a free person, the actio quasi institoria is available. If the contract, though concluded without authority, was nevertheless entered upon in the interest of another party (e. g. a contract made by a negotiorum gestor), the creditor with whom the contract was concluded may sue the other party by the actio utilis de in rem verso. The defendant, in such cases, is liable to the extent to which he was enriched by the transaction, in other words, to the extent to which he himself would be compellable to compensate the negotiorum gestor.

IV. Nature of the Actions enumerated.

All the actions we have just enumerated are praetorian actions. It is a fixed rule of the civil law, to which there is no exception, that the liability for a contract shall attach in all cases to the contracting party himself, and not to the dominus, paterfamilias, or principal. A contract concluded by one person in the name of another, and operating as against that other, is a thing unknown to the civil law. The praetor, however, taking the liability of the contracting party—the only existing liability as far as the civil law was concerned—as his basis, granted the creditor the actions we have just discussed against the dominus, paterfamilias, and principal (dominus negotii) respectively. The praetorian action was superadded to the civil law action (non transfertur actio, sed adjicitur). In a clause annexed to the formula it was explained why the liability of the real party to the contract gave rise to an action against another person, who, according to the civil law, had no liability whatever. Hence modern writers usually call these praetorian actions 'actiones adjecticiae qualitatis.' An actio adjecticiae qualitatis, then, is an action by which a person is sued on a contract concluded by his representative, whether free or unfree. It is the action which would be available, in each particular case, against the contracting party himself, qualified however by the clause referred to (adjecticia qualitas), which clause indicates at the same time, the limits, if any, within which the liability of the defendant is enforceable. If the contract in question is, for example, a sale, the vendor may proceed against the person represented, i.e. the dominus, paterfamilias, &c., by the actio venditi de peculio, or the actio venditi de in rem verso, or the actio venditi institoria, &c., as the case may be.

Roman law never advanced beyond the point of view according to which the contract made by a representative imposes, on principle, a liability, not on the person represented, but on the representative himself who is the contracting party, the point of view, in other words, that the liability of the person represented, where it occurs, is in all cases a liability for the act of *another*, to wit, the representative. Modern systems of law have adopted the other principle, viz. that a contract concluded by an authorized agent, acting in the name of the person he represents, is directly binding on the principal, in other words, that the liability on which the principal is sued is not the liability of another, but his own. Instances of actions after the type of the Roman actiones adjecticiae qualitatis could only occur, therefore, in modern law, if a filiusfamilias were to receive a peculium profecticium from his father (actio de peculio), or if a person were to conclude an unauthorized contract in the interest of another (actio de in rem verso, utilis de in rem verso), i. e. in cases where the liability falls, and is intended to fall, in the first instance, on the contracting party himself, and where the principal's liability, if any, is still, as it was in Roman law, a liability for the act of another, viz. the actual party to the contract. **§ 75.**

§ 36 I. de action. (4, 6): Sunt praeterea quaedam actiones, quibus non solidum, quod debetur nobis, persequimur, sed modo solidum consequimur, modo minus: ut ecce, si in peculium filii servive agamus. Nam, si non minus in peculio sit, quam persequimur, in solidum pater dominusve condemnatur: si verso minus inveniatur, eatenus condemnat judex, quatenus in peculio sit.

§ 1 I. quod cum eo (4, 7): Si igitur jussu domini cum servo negotium gestum erit, in solidum praetor adversus dominum actionem pollicetur, scilicet quia, qui ita contrahit, fidem domini sequi videtur. § 2: Eadem ratione praetor duas alias in solidum actiones pollicetur, quarum altera exercitoria, altera institoria appellatur. Exercitoria tunc locum habet, cum quis servum suum magistrum navis praeposuerit, et quid cum eo ejus rei gratia, cui praepositus erit, contractum fuerit. Ideo autem exercitoria vocatur, quia exercitor appellatur is, ad quem cottidianus navis quaestus pertinet.

§ 75. Institoria tunc locum habet, cum quis tabernae forte, aut cuilibet negotiationi servum praeposuerit, et quid cum eo ejus rei causa, cui praepositus erit, contractum fuerit. Ideo autem institoria appellatur, quia qui negotiationibus praeponuntur, institores vocantur. Istas tamen duas actiones praetor reddit, et si liberum quis hominem, aut alienum servum navi, aut tabernae, aut cuilibet negotiationi praeposuerit, scilicet quia eadem aequitatis ratio etiam eo casu interveniebat.

§ 4 eod.: Praeterea introducta est actio de peculio deque eo, quod in rem domini versum erit, ut, quamvis sine voluntate domini negotium gestum erit, tamen, sive quid in rem ejus versum fuerit, id totum praestare debeat, sive quid non sit in rem ejus versum, id eatenus praestare debeat, quatenus peculium patitur. In rem autem domini versum intellegitur, quidquid necessario in rem ejus impenderit servus, veluti si mutuatus pecuniam creditoribus ejus solverit, aut aedificia ruentia fulserit, aut familiae frumentum emerit, vel etiam fundum, aut quamlibet aliam rem necessariam mercatus fuerit.

§ 76. *Extinction of Obligations.*

§ 76. An obligation can be extinguished either ipso jure, i.e. by operation of the civil law, or ope exceptionis, i.e. by operation only of the praetorian law. In the former case, the obligation is totally destroyed, for the civil law is concerned with the existence of rights. In the second case, the obligation is only suspended, for the praetor is only concerned with the judicial assertion of rights. In the former case, moreover, the ground of extinction cannot itself be extinguished. In order to revive the obligation, it must be created afresh. In the second case, it is conceivable that the efficacy of a ground of suspension may itself be suspended, with the result that the original obligation can once more be asserted at law.

I. Modes of Extinction operating ipso jure.

Extinctions operating ipso jure may be effected: (1) by a 'contrarius actus'; (2) by satisfaction of the creditor; (3) by subsequent impossibility of performance.

§ 76.

1. Contrarius Actus.

Under the old civil law payment in due legal form is required for the extinction of a debt. The mere fact that the creditor has actually obtained what is due to him—which constitutes the solutio of the jus gentium—is not sufficient at civil law to extinguish the obligation. Two things, however, are requisite to constitute payment in due legal form: firstly, it must satisfy the creditor; secondly, it must give solemn expression to such satisfaction. In other words, it must be a payment which operates as a formal legal discharge of the debtor.

This rule of the early law was the source of those formal modes of extinguishing obligations which we find in the classical civil law. 'Formal' modes of extinction are such modes as result in the discharge of a debtor by a mere formal or imaginary payment (imaginaria solutio), a payment which, owing to the tendency to formalism so characteristic of the old pontifical jurisprudence, took the shape of an act reversing the prior act by which the obligatio was created (contrarius actus), and thereby effecting the formal legal discharge of the debtor.

Among such formal modes of extinction 'nexi liberatio' requires to be mentioned in the first place. Nexi liberatio was a solemn act which was framed and designed to operate as an extinction of a nexi obligatio, i. e. an obligation incurred by a solemn loan per aes et libram with the words 'dare damnas esto' (sup. p. 26). It was used, however, not merely for the purpose of discharging a debt contracted by a solemn loan, but for discharging any debt where, in the old law, the debtor stood in the same position as though he had been condemned by the judgment of a court (a judgment debt, a legacy per damnationem, inf. § 102). At one time nexi liberatio was a genuine payment. The debtor was discharged by means of the aes which was weighed out to the creditor in the presence of the libripens and five witnesses, *and also by means of the form*, the 'certa verba,' namely, by which the debtor himself declared that he was discharged from his obligation. When coined money was introduced, nexi liberatio became a purely fictitious payment. At first it was regarded as a form which was required in addition to the actual

§ 76. payment (the latter taking place apart from the formal act), in order that such payment might operate as a valid discharge[1]. Subsequently, however, the bare form of nexi liberatio came to be treated as capable of extinguishing a nexi obligatio and other debts which produced the same effect as nexum, viz. judgment debts and legacies per damnationem. Nexi liberatio thus passed into a form not only of payment, but also of release—a release which was accomplished by a solemn declaration, made by the debtor himself in the presence of, and therefore with the consent of, the creditor, to the effect that he stood thereby discharged of his debt.

In the case of debts of any other kind the legal formality of the payment was effected by means of a formal discharge from the creditor. Here again—and it was to the pontifical jurisprudence that the fact was due—the rule which was adopted was the rule of the contrarius actus. On the payment of a debt contracted literis (§ 68), the receipt had to be formally given literis, i. e. by a 'literal' acceptilatio (p. 307). On the payment of a debt contracted verbis (§ 67), the creditor had to give a receipt verbis ('verbal' acceptilatio). And, as in the case of nexi liberatio, so here, the discharge of the debtor was accomplished, in the first instance, by the combined effects of both acts, viz. the payment *and the receipt*, both which acts taken together constituted the one act of formal legal payment; subsequently, however, the receipt by itself was regarded in the light of an imaginaria solutio, and, as such, was allowed to operate an extinction of the obligation.

This was the origin of acceptilatio, whether literis or verbis, i. e. the formal contract of release which, in the form of the verbal acceptilatio, plays so important a part both in classical Roman law and in the Corpus juris. Acceptilatio verbis is a discharge by stipulatio. The debtor asks the creditor whether he *has received*

[1] Thus two things were needed: firstly, the form of nexi liberatio (per aes et libram); secondly, actual payment. The mere form, without more, did not originally discharge the debtor (sup. p. 158, n. 11). That this was the case is clearly shown (inter alia) by the fact that, to the very last, the only debt that could be extinguished by nexi liberatio was one where the debtor stood condemned to pay such things as could be the objects of a contract of loan (sup. p. 228). Nexi liberatio thus remained all along a transaction whose material character was clearly defined, viz. the payment of a loan, or of a debt analogous to those contracted by loan. Cp. GAJUS III § 175.

what he (the debtor) had promised, and the creditor answers in the affirmative (quod ego tibi promisi, habesne acceptum? habeo). According to the classical law, this verbal acknowledgment has the effect of extinguishing ipso jure the creditor's claim on the stipulatio, because the words employed represent the old form of payment, viz. the contrarius actus for the obligatio verbis contracta. But by the rule of the contrarius actus it is only a verbal obligation (i. e. a debt created by stipulatio) that can be extinguished by such an acceptilatio, just as it is only a literal debt that can be extinguished by a literal acceptilatio (p. 307). If it is desired to extinguish any other debts by acceptilatio verbis, those debts must first be transformed by novation (inf. under 2) into a debt by stipulatio. If the object of the parties is to obtain a general discharge and complete exoneration of the debtor by acceptilatio, the formula of the so-called stipulatio Aquiliana is employed for the purpose of first novating (i. e. converting into a debt by stipulatio) all the liabilities of one party as against the other, and then discharging those liabilities by a verbal acceptilatio. The stipulatio Aquiliana was thus a comprehensive stipulatio concluded for the purpose of effecting a comprehensive acceptilatio. § 76.

Acceptilatio literis fell into disuse together with literal contracts, so that in Justinian's law the acceptilatio verbis is the only recognized form of acceptilatio.

The Roman jurists extended the principle of contrarius actus to the extinction of consensual contracts (sale, hire, &c.) 'mutuo dissensu.' As long as neither party has done anything under the contract (re nondum secuta), so that the consensus is the sole binding element, an obligation contracted consensu can be extinguished by mutuus dissensus (contraria voluntate)[2].

L. 80 D. de solut. (46, 3) (Pomponius): Prout quidque contractum est, ita et solvi debet.

Gaj. Inst. III § 173: Est etiam alia species imaginariae solutionis per aes et libram; quod et ipsum genus certis in causis re-

[2] On the above subject see Erman, *Zur Geschichte d. röm. Quittungen und Solutionsacte* (1883).

§ 76. ceptum est, veluti si quid eo nomine debeatur, quod per aes et libram gestum sit, sive quid ex judicati causa debeatur. § 174: Eaque res ita agitur: adhibentur non minus quam quinque testes et libripens; deinde is qui liberatur, ita oportet loquatur: QUOD EGO TIBI TOT MILIBUS CONDEMNATUS SUM, ME EO NOMINE A TE SOLVO LIBEROQUE HOC AERE AENEAQUE LIBRA: HANC TIBI LIBRAM PRIMAM POSTREMAMQUE EXPENDO SECUNDUM LEGEM PUBLICAM; deinde asse percutit libram eumque dat ei a quo liberatur, veluti solvendi causa.

§ 1 I. quib. mod. obl. toll. (3, 29): Item per acceptilationem tollitur obligatio. Est autem acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri, ut patiatur haec verba debitorem dicere: QUOD EGO TIBI PROMISI, HABESNE ACCEPTUM? et Titius respondeat: HABEO. Sed et Graece potest acceptum fieri, dummodo sic fiat, ut latinis verbis solet: *ἔχεις λαβὼν δηνάρια τόσα; ἔχω λαβών.* Quo genere, ut diximus, tantum eae obligationes solvuntur, quae ex verbis consistunt, non etiam ceterae. Consentaneum enim visum est, verbis factam obligationem posse aliis verbis dissolvi. Sed id quod ex alia causa debetur, potest in stipulationem deduci, et per acceptilationem dissolvi.

§ 2 eod.: Est prodita stipulatio, quae vulgo Aquiliana appellatur, per quam stipulationem contingit, ut omnium rerum obligatio in stipulatum deducatur et ea per acceptilationem tollatur. Stipulatio enim Aquiliana novat omnes obligationes et a Gallo Aquilio ita composita est: QUIDQUID TE MIHI EX QUACUMQUE CAUSA DARE, FACERE OPORTET, OPORTEBIT, PRAESENS IN DIEMVE, QUARUMQUE RERUM MIHI TECUM ACTIO, QUAEQUE ABS TE PETITIO, VEL ADVERSUS TE PERSECUTIO EST, ERIT, QUODQUE TU MEUM HABES, TENES, POSSIDES, POSSIDERESVE, DOLOVE MALO FECISTI, QUOMINUS POSSIDEAS: QUANTI QUAEQUE EARUM RERUM RES ERIT, TANTAM PECUNIAM DARI STIPULATUS EST AULUS AGERIUS, SPOPONDIT NUMERIUS NEGIDIUS. ITEM EX DIVERSO NUMERIUS NEGIDIUS INTERROGAVIT AULUM AGERIUM: QUIDQUID TIBI HODIERNO DIE PER AQUILIANAM STIPULATIONEM SPOPONDI, ID OMNE HABESNE ACCEPTUM? RESPONDIT AULUS AGERIUS: HABEO ACCEPTUMQUE TULI.

2. Satisfaction of the Creditor. § 76.

It was in consequence of the increasing influence of the jus gentium that the material satisfaction of a creditor as such became legally operative. Henceforth the legal formality of payment ceased to be necessary, and a mere informal payment, or anything equivalent thereto, was regarded as sufficient. The legal forms of payment, on the one hand, and actual payment, on the other, each followed their own line of development. The former resulted—as we have just seen—in the formal contracts of release; the outcome of the latter, i.e. of payment stripped of all formality, was the solutio of the classical Roman law.

Solutio means the performance of that which is due, whether it be a debt under a loan, a lease, or any other kind of debt. It means a payment in the material sense of the term, and its power to effect a discharge is not, like that of the formal acts of payment in the early civil law, confined to specified cases, but is a general one. For that which operates the discharge is the practical result of the payment, quite apart from any question of outward form. Nor is it necessary that the debtor himself should pay; for (unless the nature of the act itself renders such a course impossible) it is open to any third party to pay in lieu of the debtor. Nor again is it essential that the payment should be made to the creditor himself. The debtor may be just as effectually discharged by payment to another, e.g. to a creditor of the creditor, or to a person who is 'solutionis causa adjectus,' i.e. a person whom the creditor allows the debtor to pay instead of paying the creditor himself[3]. Nor is it necessary that the creditor should be paid precisely what is owed, and nothing else. The debtor is equally discharged, if the creditor consents to take something different in lieu of that which is due (the so-called 'datio in solutum'). Nay, it may even occur that the creditor is satisfied without receiving anything under the particular obligation. This is what happens in the case of a so-called 'concursus causarum lucrativarum.' For

[3] A solutionis causa adjectus is a person whom the debtor is *entitled* to pay by virtue of an agreement concluded with the creditor; a correal creditor, on the other hand, e.g. an adstipulator (sup. p. 303), is a person whom the debtor is also *bound* to pay. A solutionis causa adjectus cannot sue the debtor; an adstipulator can.

§ 76. example: if a specific thing (species) is due to me 'ex lucrativa causa,' i.e. in pursuance of a gratuitous act or promise (a legacy or a gift), and I happen to acquire such thing on another causa lucrativa (by way of legacy or gift), in such a case the object of the first obligation is attained and, though no express payment is made, the fact that I am satisfied extinguishes the obligation.

Novatio is akin to solutio. By novatio we mean the satisfaction of a creditor, not by actual performance, but by a new and rigorously unilateral promise to pay (stricti juris obligatio). When literal contracts fell into disuse, stipulatio became the only means of producing a novation (sup. p. 300 ff.). Its effect is to transform the existing debt (either with or without a change of parties) into a debt by stipulatio. The position of the creditor is a more favourable one than before. He is not required to go into the original facts of the case; it is enough if he can prove the conclusion of the stipulatio. And it is the advantage thus gained by the creditor in respect of his legal remedy that constitutes the practical value of novation. The former debt is extinguished, provided only the parties have the animus novandi, i.e. that it is their (manifest) intention to create, not an accessory stipulatio (i.e. a second ground of liability in addition to the first), but a genuine 'novating' stipulatio, where the old debt is extinguished and a new ground of liability is substituted in lieu of the former.

pr. I. quib. mod. toll. obl. (3, 29): Tollitur autem omnis obligatio solutione ejus quod debetur, vel si quis, consentiente creditore, aliud pro alio solverit. Nec interest, quis solvat, utrum ipse qui debet, an alius pro eo. Liberatur enim et alio solvente, sive sciente debitore sive ignorante vel invito solutio fiat. Item si reus solverit, etiam ii qui pro eo intervenerunt, liberantur. Idem ex contrario contingit, si fidejussor solverit. Non enim solus ipse liberatur, sed etiam reus.

§ 3 eod.: Praeterea novatione tollitur obligatio, veluti si id quod tu Sejo debeas, a Titio dari stipulatus sit. . . Sed, cum hoc quidem inter veteres constabat, tunc fieri novationem, cum novandi animo in secundam obligationem itum fuerat, per hoc autem dubium erat, quando novandi animo videretur hoc fieri, et quasdam de hoc praesumtiones alii in aliis casibus in-

troducebant, ideo nostra processit constitutio, quae apertissime definivit, tunc solum fieri novationem, quotiens hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt; alioquin manere et pristinam obligationem, et secundam ei accedere. § 76.

L. 17 D. de O. et A. (44, 7) (Julian.): Omnes debitores, qui speciem ex causa lucrativa debent, liberantur, cum ea species ex causa lucrativa ad creditores pervenisset.

3. Impossibility of Performance.

The performance of an obligation may be rendered impossible by casus, i.e. by the destruction of the thing without the debtor's act or default, or by confusio, i.e. by the merger of the qualities of debtor and creditor in one and the same person, e.g. by succession. In either case the object of the obligation has ceased to be attainable, and the obligation is ipso jure extinguished to the extent to which such impossibility is due to casus or confusio.

L. 33 D. de V. O. (45, 1) (Pomponius): Si Stichus certo die dare promissus ante diem moriatur, non tenetur promissor.

L. 95 § 2 D. de solut. (46, 3) (Papinian.): Aditio hereditatis nonnumquam jure confundit obligationem, veluti si creditor debitoris, vel contra debitor creditoris adierit hereditatem.

II. Modes of Extinction operating ope exceptionis.

1. Pactum de non petendo.

According to the praetorian law a pactum de non petendo, i.e. an informal agreement of release, is a general mode of extinguishing any obligation, no matter what the ground on which such obligation may rest, whereas, as we have seen (sup. I. 1), the formal civil law contracts of release only operate on the principle of contrarius actus, an acceptilatio verbis, for example, only being capable of extinguishing a debt of stipulatio. True, if the obligation is based on a negotium bonae fidei, the effect of a release is to debar the creditor, not only by praetorian, but by civil law (ipso jure), from recovering anything by action under the contract, because it would be contrary to bona fides to allow a man to sue for a debt he has waived. In such cases, however, the effect produced by the release is not due to the agreement to release as such, but is merely, like a number of other

§ 76. indefinable circumstances, incidental to the requirements of bona fides. In the case of a negotium stricti juris, a release is inoperative by civil law (unless indeed it satisfies the requirements of contrarius actus). The debtor to whom the promise has been made is nevertheless bound to pay, because an agreement of release as such is not known to the civil law. The praetor, however, in such circumstances grants the defendant the exceptio pacti de non petendo, for the praetorian law gives effect to an agreement of release as such. It may, however, happen that the parties subsequently conclude a new agreement by which the defendant promises payment in spite of the prior release (pactum de petendo). If so, the defendant's exceptio pacti de non petendo can be rebutted by the replicatio pacti de petendo, the final result being that the original obligation is effectually sued upon. Since the pactum de non petendo only operates by praetorian law, its effect is merely to suspend the obligation, i.e. to produce a mode of extinction which may be extinguished again in its turn.

§ 3 I. de except. (4, 13): Praeterea debitor, si pactus fuerit cum creditore, ne a se peteretur, nihilominus obligatus manet, quia pacto convento obligationes non omnimodo dissolvuntur. Qua de causa efficax est adversus eum actio, qua actor intendit: SI PARET EUM DARE OPORTERE. Sed, quia iniquum est, contra pactionem eum damnari, defenditur per exceptionem pacti conventi.

2. Compensatio or Set-off.

Compensatio, or set-off, means the balancing of a claim and counter-claim of the same kind [4]. In the case of bonae fidei judicia the justice of allowing a defendant to urge a counter-claim had to be admitted, within certain limits, even by the civil law (ipso jure). For it would have been contrary to bona fides, if judgment were allowed to go against the defendant simply, no account being taken of the fact that he (the defendant) was entitled to claim things of the same kind from the plaintiff on the same contract (ex eadam causa). But here again the civil law, consistent with itself, declined to acknow-

[4] There are many disputed points in the history of compensatio. For a discussion of the controversy and a careful statement of the different views that have been put forward see the recent work of E. Stampe, *Das Compensationsverfahren im vorjustinianischen stricti juris judicium*, (1886), with Eisele's remarks thereon in the *Kritische Vierteljahrsschrift*, vol. xxix. p. 37 ff.

ledge that the defendant had any *right* of compensatio as such. It was a matter entirely within the discretion of the judge whether he would allow a set-off or not [5]. Where, therefore, the condemnation of the defendant was qualified by a set-off, such a qualification was, in the eye of the civil law, simply a consequence of the peculiar restriction imposed in bonae fidei actions on the right of the plaintiff—a restriction debarring the plaintiff from claiming any more than he was in good faith entitled to, and enforced by the judge by virtue of, and in conformity with, the terms of his commission (officio judiciis). Where a person, who was sued on a bonae fidei negotium, was acquitted (or condemned in a smaller amount) in accordance with the civil law on the ground of a counter-claim arising from the same contract, such acquittal (or modified condemnation) had its foundation, not in any *right* of compensatio vesting in the defendant, but merely in the requirements of bona fides which govern the officium judicis. § 76.

The absence of a right of set-off on the part of the defendant made itself felt at once in the actiones stricti juris. According to the civil law, a person who was sued on a loan was liable to condemnation notwithstanding the fact that he could prove a counter-claim against the plaintiff for a capital sum equal in amount to that which the plaintiff was seeking to recover from him [6]. It was not till the praetor interfered that the existence of an admissible counter-claim was made a material fact in actiones stricti juris as well as in actiones bonae fidei.

If the defendant pleaded an admissible counter-claim in the proceedings in jure, i.e. in the first stage of the suit, before the magistrate, prior to the granting of formula (sup. p. 149), the praetor would give effect to such a plea by inserting an exceptio doli in the formula (sup. p. 203). He would treat any attempt on the part of the plaintiff to enforce a negotium stricti juris, without taking notice of a

[5] GAJUS IV § 63 (Studemund ed. 2): Liberum est tamen judici (viz. in bonae fidei judicia) nullam omnino invicem conpensationis rationem habere; nec enim aperte formulae verbis praecipitur, sed quia id bonae fidei judicio conveniens videtur; ideo officio ejus contineri creditur.

[6] Since it is the essence of negotia stricti juris to give rise to a merely unilateral obligation, a counter-claim ex eadem causa is obviously impossible, and the only possible counter-claim, if any, must be one ex dispari causa.

§ 76. proper counter-claim on the part of the defendant, as an inequitable proceeding which he would refuse to allow, though the civil law placed no obstacle in the way. But the effect of such an exceptio doli, granted on the ground of a counter-claim properly set up, was not a set-off, but the *acquittal* of the defendant (provided he succeeded in proving his counter-claim in judicio), and that quite regardless of the extent of such counter-claim. Thus, what the praetor had done in the case of actiones stricti juris was not to introduce the principle of set-off, but to compel the plaintiff, by indirect means (viz. on pain of forfeiting his whole claim), to deduct the amount of the counter-claim himself at the time of commencing his action, or rather *before* the granting of the formula, i.e. before the litis contestatio.

The next step in the development of compensatio was effected by a rescript of Marcus Aurelius, which provided that where an exceptio doli was inserted in the formula in a judicium stricti juris on the ground of an admissible counter-claim, such exceptio should operate by way of set-off. In all cases, therefore, where an exceptio doli was thus inserted, the defendant, on making good his plea, was not for that reason entitled to a simple acquittal in respect of his whole debt, but only to an acquittal to the extent of his counter-claim. The necessity, however, for the praetorian remedy by exceptio doli remained unaffected, and if the defendant in an actio stricti juris failed to get such an exceptio inserted, he was debarred from advancing a set-off. In other words, the defendant in a judicium stricti juris was still obliged to set up his counter-claim in jure with a view to having an exceptio doli embodied in the formula. The civil law still refused to acknowledge any right of compensatio, and, where the principle was admitted, it operated, as before, not ipso jure, but only ope exceptionis, i.e. by the praetorian law.

But an exceptio, like this exceptio doli of the rescript, the purpose of which was to give effect to a counter-claim, was a very anomalous kind of exceptio. It is, as we have seen (sup. pp. 197, 204), the essence of an exceptio that it operates to acquit the defendant 'by way of exception.' And yet the purpose of this particular exceptio doli was in effect to determine, not *whether* the defendant should be con-

demned to pay, but *what* he should be condemned to pay [7]. Such an exceptio was not in reality an exceptio at all, because it did not imply an exception from, but rather an interpretation of, the order to condemn. The right of the plaintiff to have judgment given in his favour did not simply depend on the defendant proving, or not proving, his exceptio doli, and the condemnatio continued, notwithstanding the exceptio, to be conditional on the truth of the intentio. The only question now was the amount in which the defendant would be condemned. In the same way it had formerly been the practice of the praetor, in granting a bonorum emtor (sup. p. 211) a right of action, to qualify such right by adding the words 'cum deductione.' That is to say, if the bonorum emtor sued for a debt due to the bankrupt, the judge was instructed to condemn the defendant 'cum deductione,' i. e. to condemn him in the balance due from him to the bankrupt after deducting the amount, if any, due from the bankrupt to him. The condemnatio thus became an incerti condemnatio, even where the object of the bonorum emtor's claim was a certum [8]. The result was that an exceptio doli, when inserted for the purpose of enforcing a counter-claim, became the means whereby actiones stricti juris were in all cases converted into actions with a condemnatio incerti. § 76.

Assuming then that an exceptio doli has been inserted in the formula and that the defendant has succeeded in establishing his counter-claim in the action, a question will arise as to the true effect to be given by the judge to such counter-claim. It might be urged, on the one hand, that the plaintiff's claim should not be regarded as

[7] Paulus, in defining an exceptio in l. 22 pr. D. de except. (44, 1): 'exceptio est condicio, quae modo eximit reum damnatione, modo minuit damnationem,' takes account of this exceptio doli which operates to produce a set-off, but his own words '*condicio* quae *minuit* damnationem' serve, at the same time, to bring out very clearly the contradiction involved in such a definition.

[8] The case of an argentarius (banker) was treated somewhat differently. The praetor required a banker to sue his customer on a current account 'cum compensatione,' because the relationship between banker and customer, which is based on a series of payments and counter-payments on a running account, gives rise to an obligation to pay, not the separate items, but only the balance. In such cases the intentio specified the balance claimed by the plaintiff, i. e. the excess of his claim over the amount due from him to the defendant. The intentio being certa, the plaintiff could thus only succeed, if the sum claimed by him in the intentio was really the precise balance due to him after settling the account; whereas in proceedings 'cum deductione' the formula left the extent to which the claim would be diminished by the counter-claim doubtful.

§ 76. cancelled *pro tanto* till the moment when the judge has actually acknowledged the justice of the defendant's plea of set-off. On the other hand, it might be said that the plaintiff's claim ought to be treated as cancelled *pro tanto* from the moment when the claim and the counter-claim first co-existed. The question would be of importance where, for example, the plaintiff's claim carried interest with it and the defendant's counter-claim did not. If the former view were taken, the plaintiff might claim interest in the meanwhile; if the second view were taken, he had no such right. The question was this: where the defendant raises a plea of set-off, ought such a plea to be taken as signifying a disposition, a willingness, on his part, to conclude an *agreement* of set-off with the plaintiff (because, if so, the set-off could only operate prospectively and not retrospectively), or ought it simply to be taken as an allegation of *fact* (viz. an allegation of the existence of a counter-claim) which, without any act on the part of the defendant, and without any intention on the part of the plaintiff, operates automatically, as it were, to limit the binding force of the plaintiff's right to the difference in the amount of the two claims? In the latter case compensatio must be regarded as dating back retrospectively to the moment in which the counter-claim first came into existence. Roman jurisprudence decided in favour of the second alternative and expressed the view it adopted in the rule: *ipso jure compensari*. In all cases, however, the effect of the coming into existence of a counter-claim as such is not an immediate cancelling of the original claim, but merely a provisional linking together of claim and counter-claim. In order to convert a mere joinder into an extinction one of two things must happen: either the parties must voluntarily agree to set-off their reciprocal demands, or the defendant must successfully establish his plea of set-off in the action. In either case the original claim becomes irrevocably bound up with the counter-claim, and is thereby rateably cancelled. Up to the moment however, when the two claims have become irrevocably bound up, payment of one of the debts, or even set-off of a different counter-claim, will operate to sever the provisional joinder of the claims. A counter-claim thus constitutes, in all cases, a mere ground of *set-off* operating ipso jure, the immediate effect of which is—and it is an

§ 76.

effect which may be reversed again by other processes—to weaken the force of the creditor's claim in favour of the debtor. But a counter-claim never constitutes a ground of *extinction* operating ipso jure. Where an extinction results from a counter-claim, such a result does not arise ipso jure, but is invariably based on an agreement or a judicial decision, and in the case of a judicium stricti juris this judicial decision still depends, as it did before, on the prior grant of an exceptio doli by the praetor. Accordingly, the power of a counter-claim to extinguish a claim which is sued for, is still due, as it always was, to the praetorian, and not to the civil law; the counter-claim still operates ope exceptionis and not ipso jure, in spite of the rule as to ipso jure compensari. Justinian subsequently made a plea of set-off a ground of defence operating ipso jure in the processual sense of the term. According to Justinian's law a plea of set-off may be advanced at any stage of the action, and the judge need not be expressly authorized to take such a plea into account. The only condition required is that the counter-claim shall be easy of proof (liquida), i. e. the evidence necessary to establish it must not delay the final decision of the case. With this restriction Justinian admitted pleas of set-off in all cases whatever, whether the claims arose ex dispari causa or ex eadem causa, and even where the claim was asserted by means of a real action, for example, a real action for damages. Certain specified cases only were excepted, e.g. the actio depositi directa. But even in Justinian's law the effect of a counter-claim, from the point of view of private law, is not to cancel the other claim ipso jure, but merely to suspend it—a further act (viz. an agreement or a judgment) being necessary to convert the suspension into an extinction.

L. 1 D. de compensat. (16, 2) (Modestinus): Compensatio est debiti et crediti inter se contributio.

L. 21 eod. (Paulus): Posteaquam placuit inter omnes id, quod invicem debetur, ipso jure compensari, si procurator absentis conveniatur, non debebit de rato cavere, quia nihil compensat, sed ab initio minus ab eo petitur.

L. 11 eod. (Ulpian.): Cum alter alteri pecuniam sine usuris, alter usurariam debet, constitutum est a divo Severo, concur-

§ 76. rentis apud utrumque quantitatis usuras non esse praestandas.

§ 30 I. de act. (4, 6): In bonae fidei autem judiciis libera potestas permitti videtur judici ex bono et aequo aestimandi, quantum actori restitui debeat. In quo et illud continetur, ut, si quid invicem actorem praestare oporteat, eo compensato, in reliquum is, cum quo actum est, condemnari debeat[9]. Sed et in strictis judiciis ex rescripto divi Marci, opposita doli mali exceptione, compensatio inducebatur. Sed nostra constitutio eas compensationes, quae jure aperto nituntur, latius introduxit, ut actiones ipso jure minuant, sive in rem, sive personales, sive alias quascumque; excepta sola depositi actione, cui aliquid compensationis nomine opponi, satis impium esse credidimus, ne sub praetextu compensationis depositarum rerum quis exactione defraudetur.

3. As to the extinction of obligations by litis contestatio, v. sup. § 42 I.

According to the civil law capitis deminutio (even capitis deminutio minima, sup. p. 125) had the effect of extinguishing the contractual and quasi-contractual debts of the capite minutus. The praetor counteracted the mischief attending such a destruction of obligations by granting the creditors in integrum restitutio as against a capitis deminutio minima, and an utilis actio in eos ad quos bona eorum pervenerunt (l. 2 pr. D. 4, 5), as against a capitis deminutio media and maxima.

L. 2 § 1 D. de cap. min. (4, 5): Ait Praetor: QUI QUAEVE, POSTEAQUAM QUID CUM HIS ACTUM CONTRACTUMVE SIT, CAPITE DEMINUTI DEMINUTAE ESSE DICENTUR, IN EOS EASVE PERINDE QUASI ID FACTUM NON SIT, JUDICIUM DABO.

[9] The words of the text (Gajus iv. § 61) which was used in framing this passage were as follows: [In quo et illud] continetur, ut, habita ratione ejus, quod invicem actorem *ex eadem causa* praestare oporteret, in reliquum eum cum quo actum est, condemnare. We have already observed that the principle of set-off as acknowledged by the civil law in the case of bonae fidei judicia (where it was regarded as a consequence flowing from the requirements of bona fides) was restricted to claims and counter-claims arising ex eadem causa. According to Justinian's law the nature of the legal ground on which the counter-claim is based is immaterial.

BOOK III.

THE LAW OF FAMILY AND THE LAW OF INHERITANCE.

CHAPTER I.

The Law of Family.

§ 77. *Introduction.*

§ 77. Family relations, in so far as they are regulated by legal rules, and are thereby invested with the character of legal relations, are of two kinds: they are either relations of power or they are proprietary relations. The conception of private law would, strictly speaking, only embrace the law of the proprietary relations of the family (sup. p. 99.) But inasmuch as the nature of these relations depends upon the nature of the corresponding relations of power, it is customary, in setting forth the law of the proprietary relations of the family (the so-called private, or applied, family law), to couple with it an exposition of the law concerning the relations of power which arise in a family (the so-called pure family law).

A family gives rise to three forms of power corresponding to which there are three kinds of proprietary relations: firstly, the marital power, and the proprietary relations of husband and wife; secondly, the parental power, and the proprietary relations of paterfamilias and filiusfamilias; thirdly, the tutorial power, and the proprietary relations of guardian and ward. Thus Family Law is divided into three parts: (1) the Law of Marriage; (2) the Law of Patria Potestas; (3) the Law of Guardianship.

§ 77. It will be necessary, by way of supplying a foundation for the subject-matter, to premise an explanation of the conception of family, and of the terms by which the constituent groups of a family are denoted.

§ 78. *The Family.*

§ 78. I. The Conception of Family.

A family, within the meaning of Roman civil law, means an *agnatic* family, i. e. the aggregate of all those who are bound together by a common patria potestas. 'Agnates' are all those who stand under the same patria potestas or would have done so, if the common ancestor were still alive. Agnatio is not produced by blood-relationship alone. A mother, as such, is not an agnate of her own children; she only becomes so, if, in consequence of her marriage, she passes into the manus, i. e. the patria potestas, of her husband, and is thereby united with her children under the same patria potestas. She then becomes an agnatic *sister* of her own children. Again a man's grandchildren by his daughter are not his agnatic relations, because they fall under the patria potestas of their own father, or paternal grandfather, as the case may be (sup. p. 121), so that there is no patria potestas to connect them with their maternal grandfather. And conversely persons can be agnates without being blood-relations at all. In all cases where patria potestas is artificially created by a juristic act (adoption or in manum conventio), the effect is to make the person adopted, or the wife, an agnate not merely of the adoptive parent, or the husband, but also of all the other agnatic relatives of the new agnate, because, according to the civil law, community of patria potestas is the sole criterion for determining whether any given persons are related or not.

The agnatic family of the civil law means the aggregate of those who belong to the same *household*. Community of patria potestas—whether such patria potestas be actual or merely ideal (i. e. continuing to exist only in its effects)—means community of household in the technical sense of the term. Such a community includes none but those who are related on their father's side (per sexum virilem), and its formal foundation is a *legal* relationship, viz. patria

potestas, which admits both of artificial creation (see the above cases of adoption and in manum conventio) and of artificial extinction (see the cases of capitis deminutio minima, sup. p. 124). § 78.

The conception of family in the jus gentium is a different one. The family of the jus gentium is the *cognatic* family. Cognatio means relationship based on consanguinity. As the father is the type and representative of the agnatic principle, so the mother is the type and representative of the cognatic principle. Perhaps there was once even a time when cognatio could only be produced by relationship on the mother's side, just as agnatio could only be produced by relationship on the father's side. In historic times, however, cognatio may mean relationship on the father's as well as on the mother's side. Agnatio then ceases to be opposed to cognatio and becomes merely the name for a smaller group contained within the wider range of cognatio.

The essence of cognatio is community of blood, not community of household; and its foundation is a natural, not a legal relationship. Hence (unlike agnatio) cognatio can neither be artificially extinguished nor can it be artificially created as such. When, however, agnatic relationship came to be recognized as existing within the larger limits of cognatio, the artificial creation of agnatio operated to confer on the new agnate the rights of a cognate as well, and, in this sense, *produced* cognatio.

The development of the Roman law of family and the Roman law of inheritance proceeded broadly on the following lines. The early civil law recognized agnatio alone. Subsequently, and more especially through the agency of the praetor, the claims of cognatio asserted themselves, till ultimately, through the legislation of the empire, the cognatic principle succeeded in superseding its rival altogether. In this as in other departments of law the final completion of the development was due to Justinian, some of whose reforms on this subject were not effected till the publication of his novels. Just as in the older times everything depended on agnatio, so in Justinian's law everything turns on cognatio. The civil law conception of a family was finally displaced by the conception of a family as recognized in the jus gentium.

§ 78. § 1 I. de leg. agn. tutela (1, 15): Sunt autem adgnati per virilis sexus cognationem conjuncti, quasi a patre cognati, veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et patrui filius, neposve ex eo. At, qui per feminini sexus personas cognatione junguntur, non sunt adgnati, sed alias naturali jure cognati.

L. 10 § 4 D. de gradibus (38, 10) (Paulus): Inter adgnatos igitur et cognatos hoc interest, quod inter genus et speciem. Nam, qui et adgnatus, et cognatus est, non utique autem qui cognatus est, et adgnatus est. Alterum enim civile, alterum naturale nomen est.

L. 195 § 5 D. de V. S. (50, 16) (Ulpian.): Mulier autem familiae suae et caput et finis est.

II. The Constituent Members of a Family.

A family is divided into ascendants and descendants, on the one hand, and collaterals, on the other hand. Ascendants and descendants are said to be related to one another 'linea recta,' i. e. the one descends from the other. Collaterals, on the other hand, are said to be related 'linea transversa' ('obliqua'), i. e. they both descend from a common ancestor.

The proximity or degree of relationship, whether in lineal or collateral relations, depends on the number of generations which separate the persons in question. 'Quot generationes tot gradus.' Thus father and child are related in the first degree, grandfather and grandchild in the second degree, brothers and sisters in the second degree, and so forth. Collaterals are said to be of the whole blood, when they have the same father and mother; they are said to be of the half blood, when they have either the same father or the same mother. The Romans apply the term 'consanguinei' both to children who are of the whole blood (called by modern writers 'germani') and to children of the same father only. Children by the same mother only are called 'uterini.' Complex relationship occurs in the case of children of parents who are already related to one another. Affinity is the connection which subsists between a person and the cognates of his or her spouse. Children not born in wedlock are only related to their mother and her cognates, not to their reputed father.

The 'gentiles' of the early Roman law were members of the same clan (gens). The clan formed a wider group over and above the family and played an important part both in public and in private law (cp. e. g. inf. § 98). When the consciousness of the mutual connection between 'gentiles' was lost, the word dwindled into a mere designation for a group of persons with a common name, without possessing any legal importance. § 78.

L. 1 pr. D. de grad. (38, 10) (Gajus): Gradus cognationis alii superioris ordinis sunt, alii inferioris, alii ex transverso sive a latere. Superioris ordinis sunt parentes, inferioris liberi; ex transverso sive a latere fratres et sorores liberique eorum. § 1: Sed superior quidem et inferior cognatio a primo gradu incipit; ex transverso sive a latere nullus est primus gradus, et ideo incipit a secundo.

L. 10 § 14 eod. (Paulus): Avia paterna mea nupsit patri tuo, peperit te; aut avia paterna tua nupsit patri meo, peperit me: ego tibi patruus sum et tu mihi.

Cicero Top. c. 6: Gentiles sunt, qui inter se eodem nomine sunt. Non est satis. Qui ab ingenuis oriundi sunt. Ne id quidem satis est. Quorum majorum nemo servitutem servivit. Abest etiam nunc. Qui capite non sunt deminuti. Hoc fortasse satis est. Nihil enim video Scaevolam pontificem ad hanc definitionem addidisse.

I. The Law of Marriage.

§ 79. *Marriage and the Modes of contracting it.*

Marriage is the full legal union of man and woman for the purpose of lifelong mutual companionship. Such a union is not complete, according to the early Roman law, unless the husband has absolute power over the person of his wife ('manus mariti'). Hence marriages were usually concluded by means of an ancient traditional ceremony representing a purchase of the bride ('coëmtio'), i. e. the intending husband purchased the daughter from the person in whose power she stood, with a view to thereby acquiring the marital power without which marriage as a legal relationship was § 79.

§ 79. considered impossible[1]. In addition to coëmtio, a religious form of marriage was developed, called 'confarreatio.' A sacrifice offered to Jupiter with certain prescribed ceremonies and the use of a traditional form of words (certa verba) was deemed to have the effect of solemnly uniting a man and woman for all sacrificial purposes, and consequently for lifelong companionship, and further —for the two things were considered inseparable—of placing the wife in manum mariti. In the case of coëmtio the right to matrimonial cohabitation is the result of the power which the husband acquires over the wife; conversely, in the case of confarreatio, the power which the husband acquires over his wife is the result of the right to matrimonial cohabitation which the ceremony of confarreatio confers upon him. Coëmtio was the ordinary form in which any Roman citizen, whether patrician or plebeian, might contract a marriage. Confarreatio was a special form of marriage confined to the patricians[2].

The marriage with manus, which is characterized by its peculiar and rigorous effects on the person and property (inf. § 80) of the wife, is part of the specifically Roman jus civile. Aliens are therefore debarred from such marriages nor can they avail themselves of the forms by which they are entered upon. What is known as the 'jus connubii' of the Roman citizen—a right which, since the lex Canuleja of 443 B.C., applied equally to intermarriages between patricians and plebeians—consists in the capacity to contract a Roman marriage *with manus*.

The idea that there can be no real marriage without marital manus is illustrated by the rule of the early civil law that, even in the case of marriages concluded without the requisite forms, manus arises at once as soon as the fixed intention of the parties to live as man and wife is clearly evidenced by their having, in point of fact, continued their matrimonial cohabitation for an uninterrupted

[1] In later times the wife sells *herself*. In the same way in Germany the daughter was first betrothed by the person in whose power she stood (her father or guardian), but subsequently betrothed herself, and consequently received the customary 'bride-price' from the bridegroom herself.

[2] As to the original forms of marriage in the ancient Aryan law which correspond to the forms mentioned in the text, cp. Leist, *Altarisches jus gentium*, p. 125 ff.

period. Just as a bride may be purchased, so she may be acquired by usucapio. Both these rules are in an equal measure the outcome of the ancient view which regarded the daughter as a mere chattel belonging to her father. Land could be acquired by usucapio in two years; for all other things (ceterae res) one year was sufficient (sup. p. 240). Hence if a man took another's daughter to his home without lawful purchase or confarreatio, she became his wife by usucapio in the course of one year. And at the same moment she passed into his manus 'usu,' as it was termed, and with the acquisition of manus the requirements of a full legal marriage of the Roman civil law were satisfied [3]. § 79.

This whole development took place at a very early period, and carries the evidence of its great antiquity on the face of it. At the time of the Twelve Tables marriage by usus was fully recognized and very frequently resorted to. But what is more important is the testimony borne by the Twelve Tables to the fact that the foundation of marriage by usus, viz. the early notion of the indispensability of manus for constituting a valid marriage, has already been abandoned. We have here the first indications of a new development in the Roman law of marriage.

The criterion of matrimonial cohabitation is, as we have seen, that it should be uninterrupted. If therefore the woman absents herself from the man during the year of usucapio, even though it be only to visit her father, the man's usus is 'broken' (usurpatio), and a marriage by usus becomes impossible. The ancient law looks at nothing but the form, the outward act, and never at the intention which may perhaps underlie a temporary separation of husband and wife. For purposes of a marriage by usus the cohabitation

[3] The marriage by usus was probably the outcome of the most ancient form of marriage, viz. marriage by capture. There are not a few tribes where the legality of marriages originating in forcible abduction is not recognized till after the expiry of a definite period. Cp. J. Kohler, *ZS. f. vergleichende RW*, vol. v. (1884), pp. 342, 346, 364, 366. The Roman law of marriage likewise presupposes a time when marriages were effected by means of one of the two original modes, viz. by the purchase or capture of the bride (witness the 'rape of the Sabine women'). Cp. L. Dargun, *Mutterrecht u. Raubehe* (Gierke's *Untersuchungen zur deutschen Rechtsgeschichte* xvi. 1883), pp. 100–102.—As to the origin and growth of the free marriage among the Romans, cp. Bernhöft, *ZS. f. vergleichende RW.*, vol. viii. (1888), pp. 197, 198.

§ 79. (during the year of usucapio) must be uninterrupted, in the literal meaning of the term. In this sense even marriage by usus may be said to require a certain form.

One of the laws of the Twelve Tables dealt with this 'usurpatio' which interrupts the usus of the matrimonial year and annuls its effect. This law provided that usurpatio should be deemed to have taken place, if the woman was absent from the house of the man for but three consecutive nights (trinoctium). The same law further provided that such a trinoctium, if repeated every year, should be sufficient for the purpose of permanently preventing manus from arising in respect of the marriage.

These rules testify to the working of ideas entirely different from those which, at an earlier date, had produced marriage by usus. It is obvious that this trinoctium of the Twelve Tables means merely a symbolical interruption of the cohabitation. The 'breaking' of the matrimonial cohabitation is a mere fiction which is employed for the sole purpose of shutting out the possibility of manus mariti arising. A new conception of marriage is here clearly presented to our view: there can be marriage *without* manus. The early law assumed that usurpatio, i. e. the deliberate interruption by the parties of their cohabitation, was evidence of the absence of intention to marry. But in the new view of marriage which was gradually asserting itself a usurpatio might take place (by a mere trinoctium) notwithstanding the existence of an intention to marry. What the parties desired was, indeed, to marry, but to marry without manus, and it was this desire that the Twelve Tables sanctioned and gave effect to. So far from introducing marriage by usus, the Twelve Tables in reality afford the best evidence of its decline.

The adoption of the view that manus could be acquired by usus marks the first step in the process by which marriages informally concluded without coëmtio or confarreatio, gained the recognition of the law. If a man was in usucapio possession of the woman he wished to take to wife and was therefore certain that, after the lapse of a year, he would be his wife's lawful lord and husband, the relations subsisting between such persons prior to the

expiry of the year were not mere relations of fact quite disconnected with matrimony, but were, in their very nature, matrimonial, i. e. legal relations, recognized by the law and clothed by it with certain effects. Just as usucapio possession implicitly contained the idea of ownership (sup. p. 249) even before the period of usucapio was complete, so the usucapio possession of the woman implicitly contained the idea of marriage even prior to the expiry of the year of usus. In consequence, however, of the absence of manus in such cases, the view that marriages could be contracted without manus asserted itself simultaneously with the development of informally contracted marriages. And to such an extent were marriages without manus regarded as valid marriages as early as the Twelve Tables that the device of the trinoctium was frequently resorted to for the purpose of dissociating manus and marriage. § 79.

Thus even at the time of the Twelve Tables we find two forms of marriage: marriage with manus and marriage without manus. Marriage with manus (a so-called 'strict' marriage) is an institution of the civil law in the technical sense of the term, and is contracted by negotia juris civilis (coëmtio, confarreatio) or usus (which is likewise juris civilis; sup. p. 232). Aliens are therefore disqualified from making marriages with manus. Marriage without manus (a so-called 'free' marriage) is an institution of the jus gentium. It is open to aliens as well as citizens. It is contracted by a mere informal act. In the former case the wife bears the honourable name of 'materfamilias,' in the latter she is only 'uxor.' In this instance again, the result of the subsequent development was the superseding of the jus civile by the jus gentium. In the empire informal free marriages were practically the only kind of marriages in use. Coëmtio and confarreatio disappear. Usus has lost its effect, and the trinoctium is therefore no longer required. In Justinian's law the rule is that a marriage can be concluded by any expression of consensus quite regardless of its form (consensus facit nuptias), provided only that the agreement is one to enter on the marriage state at once, i. e. the consensus, in order to be operative, must be followed by an immediate execution of the agreement by means of an actual commencement of matrimonial cohabitation—a com-

§ 79. mencement which was usually solemnized by a formal 'deductio in domum.' In Roman law a marriage is concluded by consensus nuptialis, and not by consensus sponsalicius, i. e. not by an agreement to marry at some future time.

Engagements to marry were contracted in the form of a stipulatio (sponsio, sponsalia). In Rome, however, stipulationes of this kind were never actionable (cp. p. 296, n. 1), though their actionability came to be recognized in the rest of Latium[4].

'Concubinatus' is the name applied to certain quasi-matrimonial relations which, though involving some legal disabilities, were nevertheless recognized by the legislation of the empire (since Augustus) as constituting likewise a mode of lawful union of man and woman for the purpose of permanent mutual companionship. A concubine however is not called uxor, nor does she share the rank and position of the man. Nor again do the offspring of such a union (technically called 'libri naturales') fall under the patria potestas of their father. A man who was married could not have a concubine at the same time. For concubinage, like full marriage, is in its nature monogamous, and is therefore incompatible with any other relation of a similar character.

'Contubernium' is the marriage of slaves. Such a union, though actually the same as a marriage, is not recognized as such by the aw.

§ 1 I. de patr. pot. (1, 9): Nuptiae autem sive matrimonium est viri et mulieris conjunctio, individuam consuetudinem vitae continens.

L. 1 D. de ritu nupt. (23, 2) (Modestin.): Nuptiae sunt conjunctio maris et feminae et consortium omnis vitae, divini et humani juris communicatio.

Cicero Top. c. 3: Genus enim est uxor; ejus duae formae, una matrumfamilias, earum quae in manum convenerunt, altera earum, quae tantummodo uxores habentur.

Gaj. Inst. I § 110: Olim itaque tribus modis in manum conveniebant, usu, farreo, coëmptione. § 111: Usu in manum

[4] Cp. A. Pernice, *Sitzungsberichte d. Berliner Akademie*, vol. li. p. 1194.

conveniebat, quae anno continuo nupta perseverabat. Quae enim veluti annua possessione usucapiebatur, in familiam viri transibat, filiaeque locum optinebat. Itaque lege XII tabularum cautum est, ut si qua nollet eo modo in manum mariti convenire, ea quotannis trinoctio abesset, atque eo modo usum cujusque anni interrumperet. Sed hoc totum jus partim legibus sublatum est, partim ipsa desuetudine oblitteratum est. § 112: Farreo in manum conveniunt per quoddam genus sacrificii, quod Jovi farreo fit, in quo farreus panis adhibetur; unde etiam confarreatio dicitur. Conplura praeterea, hujus juris ordinandi gratia, cum certis et sollemnibus verbis, praesentibus decem testibus, aguntur et fiunt. Quod jus etiam nostris temporibus in usu est. § 113: Coëmptione vero in manum conveniunt per mancipationem, id est per quandam imaginariam venditionem; nam adhibitis non minus quam quinque testibus civibus Romanis puberibus, item libripende, emit is mulierem, cujus in manum convenit. § 79.

Pauli Sent. II tit. 20: Eo tempore, quo quis uxorem habet, concubinam habere non potest. Concubina igitur ab uxore solo dilectu separatur.

Eod. tit. 19 § 6: Inter servos et liberos matrimonium contrahi non potest, contubernium potest.

L. 30 D. de R. I. (50, 17) (Ulpian.): Nuptias non concubitus, sed consensus facit.

§ 80. *Marital Power.*

Manus mariti is the marital power of the old type. It is in its nature analogous to patria potestas. An uxor in manu (materfamilias) stands legally, by virtue of the manus, 'filiaefamilias loco.' The relations between her and her husband—both as regards her person and her property—are governed by the same rules of law as apply to the case of a child. As to his power over her person, the husband has full authority to chastise his wife, and, in some cases, even to kill her, in the same way as he might chastise or kill his child. He may even sell her, like a child, into bondage. In cases of a very grave character he is required to consult a family council § 80.

§ 80. (judicium propinquorum), but this restriction on his power is based solely on custom and tradition. And even then the power to which the wife is subject in respect of life and death is the *private* power of her husband and his family. It was only in the course of the subsequent development of the law—the tendency of which was, generally speaking, to improve the position of filiifamilias—that the effect of manus, like the effect of patria potestas, was stripped of much of its harshness. On the other hand, as regards the power of the husband over his wife's property, the rule is the same as in the case of a child in power, viz. whatever she acquires she acquires for her husband, and any property which she possesses on her marriage passes in its entirety (per universitatem) to her husband by the necessary operation of the law (inf. p. 369). And inasmuch as, by marrying with manus, the wife becomes legally the child of another, i. e. passes under a different patria potestas, the consequence is that she changes her agnatic family (because she changes her patria potestas), and thereby, at the same time, undergoes capitis deminutio minima (p. 124).

The relations between a wife in manu and her children are governed by the same rules as apply between brothers and sisters. In an agnatic family, the source and foundation of which is patria potestas (sup. p. 356), the wife can never, in point of law, be the mistress of the house, nor can she even share the headship of the family with her husband. In the house of her own husband she is, legally speaking (i. e. as far as the *agnatic* relationship is concerned), nothing more than the sister of her children, since she is subject to the same patria potestas as they are. The mother can never be the head of an agnatic family, such a position being reserved for the father alone. In the eye of the law the wife is, like the children, merely one of the subjects of the agnatic household. It is but a crude kind of family law, this family law where marriage is always accompanied by manus. It is incapable of drawing any distinction between the different cases of family power. It knows of no special law of marriage corresponding to the relationship of husband and wife, the law of husband and wife being included in the law of parent and child.

§ 80. The entire law of husband and wife acquires a very different aspect when viewed in the light of 'free' marriages, or marriages without manus. The principle of subordination disappears and the principle of equality takes its place: man and wife are regarded as *partners*. Marriage law becomes something more than a particular application of the law of parent and child. The two are now clearly differentiated. The position of the wife as companion of her husband and joint-ruler of the household, which voluntary custom assigned to her even under the old marriage law[1], gradually finds legal expression. The law comes to recognize the distinction between the relationship of husband and wife, on the one hand, and father and child on the other. The law of husband and wife becomes a special branch of family law. The wife ceases to be subject to the *paternal* power of her husband. She ceases to change her agnatic family, and consequently ceases to suffer capitis deminutio. If she was sui juris prior to her marriage (because, say, her father was dead), she continues to be sui juris after her marriage. If she was in her father's power prior to her marriage, she remains in the same patria potestas after her marriage (except that, wherever such patria potestas conflicts with the power of the husband, its effect is annulled). An uxor in manu, on the other hand, is always alieni juris, because she is always in the patria potestas of her husband or of the person in whose patria potestas her husband is (p. 121).

A free marriage does not however, by any means, imply that the husband has no marital power. It would be more correct to say that a free marriage is the only marriage where there is a genuine *marital* power, i. e. a power which, instead of being a mere copy of patria potestas, is a special power peculiar to a husband as such. In a free marriage the husband has the marital power of the jus gentium, i. e. of Roman law in its advanced state of development; in the jus civile on the other hand (i. e. in Roman law in its un-

[1] Cp. Jhering, *Geist. d. röm. Rechts*, vol. ii. part I (4th ed.), p. 203 ff. The author justly points out the fallacy of supposing that the actual (i.e. the social) position of wives in ancient Rome necessarily corresponded to their legal status as regarded from the formal point of view of the ancient marriage law.

§ 80. developed condition) the marital power (viz. manus) is nothing more than a form of patria potestas.

The marital power in a free marriage consists in the husband's right to the companionship of his wife. If a third party deprives him of his wife's society—even though it be the wife's own father, acting by virtue of his patria potestas—the husband has the 'interdictum de uxore exhibenda ac ducenda[2].' Coupled with this right to the companionship of his wife, the husband has also the right to decide all questions incident to the married life. It is he, for example, who determines where they shall reside (the wife shares her husband's domicile by force of law); it is he who decides on the education (including the religious education) of the children and on the nature and extent of the household expenditure. Thus even free marriages involve the principle of the wife's subordination to the will of her husband, but it is a subordination differing in kind from the subordination of children, and modified by a fusion of the principles of subordination and partnership. The marriage with manus realizes the conception of the agnatic family. The father alone stands legally at the head of the household. The free marriage, on the other hand, realizes the conception of the cognatic family of the jus gentium. Both father and mother stand legally, as well as socially, at the head of the household. In spite of the fact that an uxor who married without conventio in manum was denied the honourable title of materfamilias—in clear token of the original view according to which marriages without manus were not perfect marriages at all—it was nevertheless precisely through the position *she* occupied in the Roman household that the rights of the mother as such obtained the express recognition of the law. She alone is legally—though indeed only according to the jus gentium—not the sister, but the mother of her children. A mother as such is

[2] This interdict, it is true, belongs to the post-classical law; it is referred to by Hermogenianus (i. e. in the middle of the 4th century). See the passage quoted at the end of this section. The only interdict on this subject found in the praetorian edict was the 'interdictum de liberis exhibendis, item ducendis' (§ 88). We are told however that Antoninus Pius (in the middle of the 2nd century), 'bene concordans matrimonium separari a patre prohibuit' (Paulus, Sent. v. 6, § 15). Cp. Lenel, *Edictum*, p. 391, n. 4.

unknown to the jus civile. It was the jus gentium which, so to speak, discovered her and introduced her into Roman law. § 80.

L. 2 D. de lib. exhib. (43, 30) (HERMOGENIAN.): De uxore exhibenda ac ducenda pater etiam, qui filiam in potestate habet, a marito recte convenitur.

§ 81. *The Proprietary Relations between Husband and Wife.*

(1) Marriage with Manus. § 81.

In a marriage with manus the proprietary relations between husband and wife were, as already observed (§ 80), the same as those between a paterfamilias and his children in power. Whatever the wife possessed at the time of her marriage passed to the husband by the necessary operation of the law, and the same rule applied to all property acquired by her after her marriage, whether by gift, devolution, personal services, or otherwise. The wife stood absolutely 'filiaefamilias loco.' As regards her liabilities, the husband was on principle as little answerable for them as he was for the liabilities contracted by his children. It was only in those particular and exceptional cases where the praetorian law fixed the father with liability for the contracts of his children, that a husband could be similarly sued by an actio adjecticiae qualitatis (sup. § 75) on a contract concluded by his wife. It was, however, considered unfair that the husband should acquire all his wife's antenuptial property without being answerable for her debts. Hence, if he refused to pay debts validly contracted by the wife prior to her marriage, the praetor would direct bankruptcy proceedings to be taken in respect of the wife's antenuptial property, thereby treating the marriage as non-existent as far as such antenuptial property was concerned.

The wife's delictual liabilities had the same effect as those of a filiusfamilias, i. e. the husband became liable to a noxal action (sup. § 73). If he was unwilling to take upon himself the consequences of his wife's delict (i. e. pay the damages or the penalty), he could deliver his wife into mancipium (servae loco, inf. p. 390) to the plaintiff. This was one of the cases where the husband's right to sell his wife into bondage acquired practical importance.

§ 81. In compensation, as it were, for the rigorous subordination of the wife in manu to her husband in proprietary matters, she is given just the same rights of succession on her husband's death as though she were a filiafamilias, i. e. she is counted, together with her children, as one of the 'sui heredes' of her husband (inf. §§ 96, 98).

GAJ. Inst. II § 98: quam in manum ut uxorem receperimus, ejus res ad nos transeunt.

Eod. IV § 80: Quod vero ad eas personas quae in manu mancipiove sunt, ita jus dicitur, ut, cum ex contractu earum agatur, nisi ab eo cujus juri subjectae sint, in solidum defendantur, bona, quae earum futura forent, si ejus juri subjectae non essent, veneant.

(2) Marriage without Manus.

Unlike the marriage with manus the free marriage of the Roman jus gentium produces, on principle, no effect on the wife's property. Both her antenuptial property and her antenuptial liabilities continue to be hers alone even after the marriage. Whatever she acquires during coverture by her own labour, by devolution, or otherwise, belongs to her alone. Her capacity of acquiring property is equal to that of her husband. Nor is she in any way inferior to him in regard to her power of *dealing* with her property: she has unrestricted authority to dispose of it in any manner she chooses. The husband has no sort of legal control over his wife's estate. If the wife chooses to entrust him with the management of her property (bona paraphernalia), he is thereby placed in the position of an agent whose duty it is to conduct the management in the interests of the wife and in accordance with her wishes (she can therefore revoke the authority at any time); but he can never claim to be entrusted with the management as a matter of right. In the free marriage of Roman law the principle of separate property is strictly applied. Not even death confers any right on the surviving husband or wife against the estate of the other. According to the civil law a free marriage does not give rise to any mutual rights of succession between husband and wife as such. It was only in later times that an indigent widow was allowed a limited claim against the property left by her husband, such claim being regarded in the light of

maintenance, which she was thought entitled to demand even after the death of her husband (inf. p. 445). Nor did the praetor introduce any essential alterations in the law. True, there is in the praetorian law a rule of mutual succession between husband and wife (bonorum possessio unde vir et uxor, inf. p. 441), but this rule only applies where none of the relations succeed to the inheritance. Even the most distant relation (provided he is entitled to succeed at all) excludes the husband from succeeding to his wife, and vice versa. § 81.

There are only three rules of law which apply to free marriages and which affect the proprietary relations between husband and wife: (1) the husband is bound to maintain his wife, and generally speaking, to defray all the household expenses; (2) mutual gifts between husband and wife are void and may be recovered at any time (provided they are not merely another form of maintenance, but involve the making over of a substantial amount of property); if, however, the party who is entitled to claim back the gift, dies before or simultaneously with the donee, without having exercised his right, the gift becomes thereby valid ex post facto ('convalescit')[1]; (3) husband and wife cannot sue one another for theft. If either of them commits a theft in view of an approaching divorce, the praetor grants the injured party a special action called the 'actio rerum amotarum' in lieu of the actiones furti. The object of this action is merely to recover compensation (i. e. it is an actio rei persecutoria). It is thus only a substitute for the condictio furtiva, and the penal action (actio furti) is not available.

In other respects free marriages may be said to produce proprietary relations only in so far as they supply the occasion for certain juristic acts, more especially for the creating of a dos and a donatio propter nuptias.

L. 8 C. de pact. (5, 14) (Theodos. et Valentin.): Hac lege decernimus, ut vir in his rebus, quas extra dotem mulier

[1] Thus the law treats a donatio inter virum et uxorem as though it were a mortis causa donatio (sup. p. 138). A donatio mortis causa is valid as between husband and wife, so that in this as in other respects donationes mortis causa are governed, not by the rules applicable to gifts, but by those applicable to legacies.

§ 81. habet, quas Graeci parapherna dicunt, nullam, uxore prohibente, habeat communionem, nec aliquam ei necessitatem imponat.

L. 1 D. de donat. inter vir. et ux. (24, 1) (Ulpian.): Moribus apud nos receptum est, ne inter virum et uxorem donationes valerent. Hoc autem receptum est, ne mutuo amore invicem spoliarentur, donationibus non temperantes, sed profusa erga se facilitate.

L. 28 § 2 eod.: . . . et sane non amare nec tanquam inter infestos jus prohibitae donationis tractandum est, sed ut inter conjunctos maximo affectu, et solam inopiam timentes.

L. 9 § 2 eod. (Ulpian.): Inter virum et uxorem mortis causa donationes receptae sunt. L. 32 § 3 eod.: Ait oratio (Antonini): fas esse, eum quidem, qui donavit, poenitere, heredem vero eripere, forsitan adversus voluntatem supremam ejus, qui donaverit, durum et avarum esse.

§ 82. *Dos.*

§ 82. The husband has to bear the expenses of the matrimonial life. It is usual, however, to give the husband a so-called 'dos,' i. e. to make over to him some property intended as a contribution, on the part of the wife, towards the defrayal of such expenses (ad matrimonii onera ferenda), and intended also as a provision in the interests of the wife, she being entitled to recover the dos after the termination of the marriage. On the dissolution of the marriage the husband is bound on principle to restore the corpus of the dotal property. It is only the fruits which accrue during the marriage that he can claim absolutely as a contribution towards the charges of the marriage state. In substance therefore the dos is the property of the wife (res uxoria), the husband being only made owner during the continuance of the marriage. The effect of the agreement under which the dos is created is thus to modify the Roman principle of separate property, inasmuch as the practical result of the juristic act constituting the dos is to place part of the property of the wife (or of the property intended for the wife) under the control of the husband so long as the marriage relation subsists[1].

[1] Cp. Wendt, *Pandekten*, § 301; Kuntze, *Cursus des Röm. Rechts*, p. 625.

§ 82. As a rule it is the wife's father that provides the dos, just as with us it is the wife's father that provides the marriage portion. The right to demand a dos belongs to the wife, and never to the husband, but all the wife can require is that a dos shall be given, not to her, but to her husband. A daughter can call for a dos—as a last act of maintenance—from her father or from her paternal grandfather (as the case may be), quite regardless of agnatic relationship, solely on the ground of cognatio. A dos provided by a person in pursuance of a legal obligation to do so, is called a dos 'profecticia.' A dos provided by any other person (e. g. the wife herself or her mother) is called a dos 'adventicia.' A dos provided by a third party on an express condition confirmed by stipulatio that it shall be restored on the dissolution of the marriage, is called a dos 'recepticia.' As regards the form in which a dos is constituted, whatever the proprietary benefit which it is intended to confer on the husband (whether it be ownership, or usufruct, or any other right), such benefit may either be made over to him at once (dotis datio), or there may be a promise by stipulatio to make it over to him dotis causa at some future date (dotis promissio), or lastly there may be a simple promise to the same effect by the wife, or her debtor, or a male ascendant in whose power she is (dotis dictio)—the latter form being employed, in accordance with ancient custom, at the time of the betrothal. The law of Justinian—following in this matter a law of Theodosius II—provided that any third party might, at any time, effectually bind himself by an informal undertaking to give a dos, the form of a stipulatio being no longer required. Thus, in Justinian's law a dos is either immediately given to the husband (dotis datio), or it is promised to him (dotis promissio and dictio). A valid promise to give a dos, in itself, constitutes the dos. The promise itself operates to augment the husband's property dotis causa by means of, and to the extent of, the obligation which it imposes on the promisor, so that, in fulfilling his promise, the promisor does not thereby constitute the dos, but rather discharges and satisfies a subsisting obligation.

As soon as the dos is actually given to the husband, or as soon as the promise to give it is fulfilled, he (the husband) acquires a legal

§ 82 right of free disposition over all such res dotales as are conveyed to him in ownership. He has all the rights and remedies incident to ownership as such, including (amongst others) the right to alienate and to mortgage. In the eye of the law *he* is the owner of the dotal property, and no one else[2]. The fact that he is, as a rule, under an obligation to restore the dos afterwards does not diminish the extent of his powers. But, though formally the dos belongs to the husband, in substance it is the wife's property (res uxoria). Hence it was that the lex Julia de adulteriis of the year 18 B.C. (which, in so far as it deals with this subject, is usually called the lex Julia de fundo dotali) prohibited the husband from alienating or mortgaging any fundus Italicus comprised in the dos. Justinian extended this prohibition to any fundus dotalis whatever. Not even the wife's consent can make a mortgage, or (according to Justinian's enactment) a sale, of the fundus dotalis by the husband valid. The object is to preserve the land intact for the wife to whom the dos will presumably revert. A mere personal claim for compensation against the husband, when the latter had alienated property, was considered sufficient as far as movables were concerned, but insufficient in the case of immovable property.

When the marriage is dissolved, the husband is bound, as a rule, to restore the corpus of the dos. The fruits which he has taken in the meantime are his. Res fungibiles (sup. p. 228) must be restored in genere, i. e. the husband must give back the same amount of things of the same quality as he received. Res non fungibiles must be restored in specie, i. e. the husband must give back the identical thing which he received. If, by reason of the husband's act or default, the identical thing is not forthcoming; if, for example, he has alienated it, or if it has been deteriorated through his negligence—he is, however, only answerable for the diligentia quam suis rebus adhibere solet (cp. pp. 313, 319)—he is bound to pay compensation.

[2] Just as the husband acquires full powers of disposition in regard to the res dotales where such res are conveyed to him in ownership, so in cases where he is given, by way of dos, not ownership, but, say, a usufruct or an obligatory right, he acquires full powers to exercise all the rights which form the object of the dos—so far of course as the rights conferred upon him are not limited by their own nature (as e. g. in the case of a usufruct, which, as far as the right itself is concerned, is inalienable).

In Roman law, the right of the wife to claim back the dos, and the correlative duty, on the part of the husband, to return it to her, passed through three successive stages of development[3]. § 82.

1. According to the civil law of the republic, the husband was legally entitled to keep the dos even after the termination of the marriage. Custom, it is true, made it his duty to restore it to the wife either by will after his death, or—if they were divorced—by conveyance in his lifetime. It was not, however, in the nature of the ancient law to erect a mere moral duty into a legal one. Ancient law recognized the formal ownership of the husband as the sole ownership subsisting in the dos, not only during the marriage, but also after its dissolution.

2. It was thus the practice arose for the person giving the dos to bind the husband by an express agreement, viz. by a stipulatio ('cautio rei uxoriae') to return the dos on the dissolution of the marriage. At a comparatively early date, however (about 200 B.C.), the so-called 'actio rei uxoriae' was granted, even where there had been no express agreement, but in this action the plaintiff was only entitled to demand 'quod melius aequius erit.' The judex appointed in the action (which was an actio bonae fidei) had power to exercise his full discretion in regard to the dotal claim. And it was in pursuance of the discretion thus vested in the judge that the rules concerning the granting of time and the so-called 'rights of retainer' were developed. As to the time within which the husband should be required to restore the dos, it was thought fair to allow him a reasonable interval for the purpose; he was directed to pay capital moneys and other res fungibiles by three annual instalments (annua, bima, trima die), his obligation to make immediate restitution being confined to res non fungibiles, i.e. things (such as land) which must be assumed to be in his possession in the same condition as he received them. As to the rights of retainer, the judge allowed the husband, in calculating the amount to be restored, to make deductions in all cases 'propter res donatas,' 'propter res amotas,' and 'propter impensas' (i.e. on the ground of expenses incurred about

[3] Bechmann, *Das römische Dotalrecht*, 2 vols. 1863, 1867; Czyhlarz, *Das römische Dotalrecht*, 1870; Dernburg, *Pandekten*, 2nd ed., vol. iii. §§ 13, 14.

§ 82. the dos). If, moreover, the dissolution of the marriage was due to the fault of the wife, he might make a deduction 'propter mores,' amounting, in the case of adultery (mores graviores), to one-sixth, in the case of other offences (mores leviores), to one-eighth of the dos. A deduction was also allowed 'propter liberos,' viz. one-sixth for each child, but the total amount to be deducted was not to exceed three-sixths of the dos. If the divorce was occasioned by the husband, he was likewise subjected to certain penalties. He lost, for example, the right to delay restitution in the manner described, and was required, in the case of mores graviores, to restore even res fungibiles at once, in the case of mores leviores, to restore them in three half-yearly instalments; and if the dos comprised res non fungibiles, he was further required to restore part of the fruits thereof (Ulpian., tit. 6 § 13). These rules (the effect of which was to some extent to curtail the discretion of the judge) received definite shape through the legislation of the Emperor Augustus. The idea which underlies them is this, that the right to claim restitution of the dos is not—in spite of the actio rei uxoriae—a definite proprietary right conferring claims of a determinate kind, but rather a right which is incident to the family relations, and, as such, confers a claim, the nature and extent of which depend upon equitable considerations and the circumstances of each case, nay even—and in this respect it is like a mere moral claim—upon the personal conduct of the parties viewed as a whole. Hence it is that the assertion of the legal claim to the dos entails, at the same time, an enquiry into the moral conduct of the husband and wife concerned.

Thus the right to sue for a return of the dos could be based, firstly, on agreement (actio ex stipulatu), and, secondly, on statute (actio rei uxoriae). So far as the action was based on agreement, it was stricti juris, and was governed by the law of contract, i. e. the plaintiff claimed the return of the corpus of the dos, neither more nor less, and a statutory claim for compensation (cp. p. 302) was as inadmissible as a statutory demand for time or a claim to be allowed to make deductions. The statutory action, on the other hand, was governed by the special rules concerning dos, i. e. by rules of family law: it was a bonae fidei action, where the defendant might be

granted time, and the plaintiff could not sue for the return of the dos simply, but could, according to circumstances, sue for something different (e. g. damages), or for more than the dos (where the divorce was due to the husband's misconduct), or for less (where the husband was allowed to make deductions). § 82.

Like all contractual actions the actio ex stipulatu was transmissible to heirs. The actio rei uxoriae, on the other hand, like all actions appertaining to the law of the family, was not transmissible, and could therefore only be employed by the wife herself, and not by her heirs. Consequently, if the marriage was terminated by the death of the wife (and there was no stipulatio to the contrary), the husband could still claim to be legally entitled to keep the dos as he was under the civil law of the republic. The only exception to this rule was made in favour of persons who gave a dos profecticia; that is to say, where the marriage was dissolved by the death of the wife, the father, or grandfather, of the wife could avail himself of the actio rei uxoriae for the purpose of recovering the dos given by him in pursuance of his statutory obligation. In all other cases, however—including therefore all cases of a dos adventicia—the rule was maintained that, in the circumstances supposed, the husband was not legally compellable to restore the dos. Hence, if a third party gave a dos adventicia, he could only recover it by means of an actio ex stipulatu, i. e. he could only recover it, if the dos was a dos recepticia.

Thus, in the law prior to Justinian the husband's obligation to restore the dos is still a very restricted one. The law continues to acknowledge the husband, even after the dissolution of the marriage, as the true owner of the dos, and it is only within certain limits that an obligatory claim existing concurrently with his ownership, and vesting in the wife or the person who gave the dos, has received the recognition of the law.

3. The completion of this course of development was due to Justinian. In Justinian's law the husband is always bound to return the dos, his right to keep it being confined to those cases only where the dissolution of the marriage is caused by the misconduct of the wife. The actio rei uxoriae becomes transmissible, i. e. it is open

§ 82. not only to the wife, but also to her heir, though if the person who gave a dos profecticia survives the wife, his right excludes that of the heir. A right of retainer can only be claimed by the husband propter impensas *necessarias*, i. e. on the ground of expenses which were necessary for the preservation of the dotal property. For the rest, immovables must be returned at once, movables in a year. If the husband has alienated any of the movable property or has negligently suffered it to be damaged, he is bound to pay compensation.

Thus in Justinian's law the right to claim restitution of the dos has become a definite proprietary right, and the statutory claim has been assimilated to the contractual one. Only a few traces of the old actio rei uxoriae are left. Justinian himself says that it is the object of his enactment to grant a statutory actio ex stipulatu in lieu of the actio rei uxoriae, but an actio ex stipulatu which shall be bonae fidei in so far as it preserves (in regard to divorce, compensation, and impensae) certain features borrowed from the old actio rei uxoriae.

Justinian, however, went a step further. If the action for the recovery of the dos is taken by the wife herself (not by her heirs or by the person who gave the dos), she (the wife) is entitled, without more, to sue as owner in respect of such of the res dotales as are, for the time being, in the possession of her husband. For the purpose, moreover, of securing the wife her legal right to recover the dos, Justinian gave her a privileged hypothec over the entire estate of her husband. In the event of the husband becoming impoverished the wife is entitled to enforce her rights at once, even during the continuance of the marriage.

The result of these reforms in the law is that, on the dissolution of the marriage, the husband practically ceases to be owner of the dotal property. His estate becomes subject in all cases to a charge for the restoration of the dos, and, as against the wife, the termination of the marriage has the effect of extinguishing his ownership.

In all these rules concerning the dos—the rules prohibiting the alienation and mortgaging of dotal land, the rule requiring the husband to exercise care in regard to the dotal property, and finally,

in the rules on the restitution of the dos in the shape given them by Justinian's legislation—we trace the recognition, by the law, of what was already acknowledged in practice as a fact, namely, that the dos belongs in substance to the wife and only in form to the husband; in a word, that dos is the property of the wife (res uxoria) which is entrusted to the husband. The husband's ownership is thus reduced in law, as well as in fact, to a mere form, the only practical benefit of which is that he is entitled to the enjoyment of the property as long as the marriage relation subsists. § 82.

Ulp. tit. 6 § 1: Dos aut datur, aut dicitur, aut promittitur. § 2: Dotem dicere potest mulier, quae nuptura est, et debitor mulieris, si jussu ejus dicat, item parens mulieris virilis sexus, per virilem sexum cognatione junctus, velut pater, avus paternus. Dare, promittere dotem omnes possunt.

§ 3 eod.: Dos aut profecticia dicitur, id est, quam pater mulieris dedit, aut adventicia, id est ea quae a quovis alio data est.

L. 5 § 11 D. de jure dot. (23, 3) (Ulpian.): Si pater pro filia emancipata dotem dederit, profecticiam nihilominus dotem esse nemini dubium est, quia non jus potestatis, sed parentis nomen dotem profecticiam facit; sed ita demum, si ut parens dederit. Ceterum si, cum deberet filiae, voluntate ejus dedit, adventicia dos est.

L. 14 C. de jure dot. (5, 12) (Dioclet. et Maximian.): Mater pro filia dotem dare non cogitur, nisi ex magna et probabili, vel lege specialiter expressa causa, pater autem de bonis uxoris suae invitae nullam dandi habet facultatem.

Ulp. tit. 6 § 13: Mariti mores puniuntur in ea quidem dote quae a die reddi debet, ita ut propter majores mores praesentem dotem reddat, propter minores senum mensum die in ea autem quae praesens reddi solet, tantum ex fructibus jubetur reddere, quantum in illa dote quae triennio redditur, repraesentatio facit.

§ 29 I. de action. (4, 6): Fuerat antea et rei uxoriae actio ex bonae fidei judiciis. Sed, cum pleniorem esse ex stipulatu actionem invenientes, omne jus, quod res uxoria ante habebat, cum multis divisionibus in ex stipulatu actionem, quae de dotibus exigendis proponitur, transtulimus, merito rei uxoriae

§ 82. actione sublata, ex stipulatu, quae pro ea introducta est, naturam bonae fidei judicii tantum in exactione dotis meruit, ut bonae fidei sit. Sed et tacitam ei dedimus hypothecam; praeferri autem aliis creditoribus in hypothecis tunc censuimus, cum ipsa mulier de dote sua experiatur, cujus solius providentia hoc induximus.

L. 75 D. de jure dot. (23, 3) (TRYFONIN.): Quamvis in bonis mariti dos sit, mulieris tamen est.

§ 83. *Donatio propter Nuptias.*

§ 83. In Roman law a gift by a man to his betrothed is, on principle, as undoubtedly valid as a gift by a husband to his wife is, on principle, undoubtedly void (p. 371). A donatio *ante* nuptias, therefore, is essentially different from a gift made after the marriage. In the later empire the term 'donatio ante nuptias' was applied, in a special technical sense, to a gift made by the intending husband (or by some other person on his behalf) to his betrothed, such gift being conditional on the marriage taking place, and being expressly designed to meet the pecuniary demands of the marriage. A donatio ante nuptias is thus primarily, not a gift in consideration of natural affection, but a gift with a perfectly definite material object—the object, namely, of endowing the future marriage with the requisite means. And it is this fact—the fact, namely, that donationes ante nuptias are intended to satisfy a specific material object—that distinguishes such gifts from ordinary gifts between betrothed persons. The ultimate purpose is to make a proper provision for the wife in the event of the dissolution of the marriage. If the wife is divorced from her husband through no fault of hers, or if she survives him, she has—save in certain exceptional cases where the law gives her a right of succession (sup. p. 370)—no legal claim against his estate except one for the restoration of her dos. It becomes, therefore, an object of importance to strengthen, as it were, her claim to the dos, and it is for this purpose that the donatio ante nuptias, in its technical sense, is employed. As a rule, the donatio ante nuptias is constituted in an amount equal to that of the dos, and Justinian gave statutory force to

this rule by means of his 97th Novel. If the wife is divorced from her husband without her fault, she is entitled by law to the donatio ante nuptias. She is equally entitled to it, though by special agreement only, in the event of her surviving her husband. The practical result in such cases is that the wife can claim payment of double the amount of her dos (cp. also inf. p. 383). During the continuance of the marriage ownership in the donatio ante nuptias vests in the husband, but where the gift includes land, the husband is prohibited, by an enactment of Justinian (Novel 61), from validly alienating or mortgaging it. § 83.

The Emperor Justinus, Justinian's father, decreed that a donatio ante nuptias might be validly increased even after the conclusion of the marriage. Justinian went a step further, and provided that a donatio ante nuptias might even be validly constituted after the marriage. The traditional name having thus become a misnomer, Justinian ordered that such gifts should in future be called donationes *propter* nuptias.

§ 84. *The Termination of Marriage.*

Marriage is terminated by the death of either party. In Roman law a marriage may also be dissolved by means of a private juristic act of the husband and wife. § 84.

In the case of a civil law marriage by confarreatio a divorce is a formal act. The form which the pontifices adopted was modelled on the principle of 'contrarius actus' (cp. sup. p. 341). A marriage by confarreatio can only be dissolved by 'diffarreatio,' i. e. by a sacrifice offered to Jupiter, the god of marriage, with certa (viz. contraria) verba. The co-operation of the pontiffs is as essential to the sacrifice of diffarreatio as it is to that of confarreatio. This would seem to be the explanation of the fact that a marriage by confarreatio could not be dissolved at will, for the pontiff might decline to co-operate where there was no ground which the jus sacrum recognized as sufficient to justify a divorce.

Marriages by coëmtio and usus, on the other hand, are dissolved by remancipatio, i.e. by a fictitious sale into 'mancipium' or bondage,

§ 84. followed by manumission on the part of the fictitious vendee. The remancipatio of a materfamilias is precisely identical with the emancipatio of a filiafamilias (inf. p. 393). In this, as in other respects, a wife in manu who has been 'purchased' is legally in the same position as a child. Just as a paterfamilias may discharge (i.e. emancipate) his child from his power, so he may discharge his wife. In its formal aspect a remancipatio is not so much an act of divorce, as an act of discharge. The rules by which an uxor in manu is treated precisely as though she were a child in power, receive here a further illustration. A wife in manu is as little a free party to the act of divorce as a child is a free party to the act of emancipation. In the old law, therefore, the consent of the wife is not necessary. She has neither power to require nor to prevent the divorce. The law gives the husband absolute authority in regard to the dissolution as well as the other incidents of a marriage with manus. Only a wife married by confarreatio is protected from arbitrary divorce on the part of her husband by the necessity of a diffarreatio.

In the jus gentium, on the other hand (i.e. in the case of free marriages), divorce is an informal act. The lex Julia de adulteriis, indeed, required the presence of seven witnesses, but the object of this provision was merely to secure clear evidence, in all cases, that the intention to separate was a deliberate one. Free marriages can be terminated by an agreement between husband and wife (divortium), or by one-sided notice on the part of either (repudium). In both cases the wife is a free party to the act of divorce, and, as such, has the same rights as the husband.

The rules of divorce as applied to free marriages were afterwards extended to marriages with manus. A wife in manu could not, it is true, directly effect the extinction of manus by means of a repudium. Nevertheless, according to the view of the later times, the wife's repudium (or divortium) operated indirectly to dissolve even marriages with manus. The husband, namely, was thereby compelled to take all necessary steps for the purpose of extinguishing the manus on his side. And finally, when marriages with manus fell into disuse altogether, the rules of the jus gentium prevailed in regard not only to the conclusion, but also to the dissolution of marriages.

§ 84. Freedom of divorce by notice from either party was not formally abolished even by the legislation of the Christian empire. However causeless the repudium, its effect was to terminate the marriage. It was, however, provided that where a marriage was dissolved without any statutory ground of divorce, the offending party should suffer certain penalties. Thus where a wife repudiated the marriage without just cause, she was ordered to forfeit her dos, and where the husband did so, he was deprived of his donatio propter nuptias; in other words, he was required to pay over, not only the dos, but also the donatio propter nuptias. And in the Christian empire it was the primary purpose of a donatio ante (propter) nuptias to confer on a wife who was divorced without cause a positive proprietary benefit at the expense of her husband (p. 381). This was the reason why, on the conclusion of every marriage, the husband was required to contribute a donatio ante nuptias corresponding to the dos contributed on the part of the wife. Both parties, as it were, gave a pledge for the maintenance of the matrimonial tie—a pledge which seemed necessary in order to counterbalance the freedom of divorce allowed by the law.

L. 2 C. de inutil. stip. (8, 38) (Alexander): Libera matrimonia esse, antiquitus placuit: ideoque pacta, ne liceret divertere, non valere: et stipulationes, quibus poenae inrogarentur ei, qui divortium fecisset, ratas non haberi constat.

L. 9 D. de divortiis (24, 2) (Paulus): Nullum divortium ratum est, nisi septem civibus Romanis puberibus adhibitis praeter libertum ejus, qui divortium faciet.

Festus: Diffarreatio genus erat sacrificii, quo inter virum et mulierem fiebat dissolutio; dicta diffarreatio, quia fiebat farreo libo adhibito.

Gaj. Inst. I § 137: Mancipatione desinunt in manu esse, et si ex ea mancipatione manumissae fuerint, sui juris efficiuntur, . . . (ea, quae cum viro suo coëmptionem fecit, virum suum) nihilo magis potest cogere, quam et filia patrem. Sed filia quidem nullo modo patrem potest cogere, etiam si adoptiva sit; haec autem virum repudio misso proinde conpellere potest, atque si ei numquam nupta fuisset.

§ 85. *Second Marriages.*

§ 85. In the event of a person marrying a second time, the interests of the children of the first marriage were, in the later Roman empire, protected by a number of legal rules which conferred certain advantages on these children, and imposed certain disadvantages on the 'parens binubus' (the so-called 'poenae secundarum nuptiarum'). This was more particularly the object of the rule that the so-called 'lucra nuptialia,' i. e. all the property which the parens binubus acquired gratuitously from his or her deceased spouse (whether by way of gift, dos, donatio propter nuptias, or testamentary disposition) should become ipso jure the property of the children of the first marriage at the moment of the conclusion of the second marriage, a usufruct only being reserved for the parens binubus.

A widow is not allowed to re-marry before the expiry of her year of mourning. If she violates this rule she suffers infamy: her rights of succession are curtailed (she being more especially disqualified from taking any property by will), and her power to dispose of her property in favour of her second husband is subjected to certain restrictions.

§ 86. *Celibacy and Childlessness.*

§ 86. The extent to which the ancient spirit of Rome was tending to decline even in the early days of the empire, is strikingly attested by the comprehensive legislation on the subject of marriage (lex Julia de maritandis ordinibus 4 A. D., and the lex Papia Poppaea 9 A. D.) which the Emperor Augustus considered it necessary to carry out. It was under these statutes that senators and their children were forbidden to intermarry with freedmen or infames, and freemen to intermarry with infames. And, at the same time, a deliberate attempt was made to promote marriages and the bearing of children by legislative enactment, by providing, amongst other things, that a woman, who, being an ingenua, bore three, or, being a liberta, four children, should be free from the tutela mulierum. The same policy finds expression in the corresponding penalties imposed on celibacy and

childlessness. Caelibes, i.e. persons who are unmarried without just cause, and orbi, i. e. childless persons, are incapacitated (incapaces) from taking any property under a will (inf. § 101 II. 2), either totally (as in the case of caelibes) or partially (as in the case of orbi). In order, moreover, to be able to take all the property given her by a will a woman must have the 'jus trium vel quatuor liberorum,' a right which, however, she may also acquire as a privilege by imperial grant. A testamentary gift to an incapax becomes 'caducum,' and, as such, may be claimed by the persons taking a benefit under the will who have children, or in default of such persons by the treasury (caducorum vindicatio). § 86.

The penalties on celibacy and childlessness were abolished by enactments of Constantine and subsequent emperors; Justinian did away with the above-mentioned prohibitions on intermarriages.

Gaj. Inst. II § 286: Caelibes per . . . legem Juliam hereditates legataque capere prohibentur; . . . item orbi . . . per legem Papiam ob id, quod liberos non habebant, dimidias partes hereditatum legatorumque perdunt . . . . . eaque translata sunt ad eos qui in eo testamento liberos habent, aut si nullus liberos habebit, ad populum.

Ulp. tit. 17 § 1: Quod quis sibi testamento relictum, ita ut jure civili capere possit, aliqua ex causa non ceperit, caducum appellatur, veluti ceciderit ab eo, verbi gratia si caelibi . . . legatum fuerit, nec intra dies centum caelebs legi paruerit.

II. Patria Potestas.

§ 87. *The Modes in which Patria Potestas originates.*

Patria potestas is acquired by virtue either of a rule of law or of a juristic act. It is acquired by virtue of a rule of law, firstly, over children begotten in lawful wedlock (not over the offspring of a concubine), secondly, by the legitimation of children not begotten in wedlock—whether such legitimation be effected 'per subsequens matrimonium,' or 'per rescriptum principis.' Patria potestas may, § 87.

§ 87. moreover, be artificially created in Roman law by means of a juristic act, viz. adoption.

Adoption may be either of a paterfamilias, in which case it is called 'arrogatio,' or of a filiusfamilias, in which case we call it adoption, in the narrower sense of the term [1]. In either case the person adopted undergoes capitis deminutio minima, because he changes his agnatic family (p. 125).

1. *Arrogatio.*

According to the old law every arrogatio required a preliminary enquiry by the pontifices and a decree of the comitia curiata. At a subsequent period arrogationes were frequently effected by means of an imperial rescript, and this was the only method in ordinary use in the later stages of Roman law. At no time, however, could an arrogatio be effected by a mere private juristic act. A change of family relations such as is involved in arrogatio is a matter of public concern. Hence the necessity for ceremonies of a public character. No one, however, could be adopted by arrogatio in the comitia curiata, unless he was himself capable of expressing his consent to the act in the popular assembly. Since every arrogatus is a party to the act of arrogatio in the comitia, he must necessarily be qualified to participate in such act in the comitia curiata. Consequently there can be no arrogatio of an impubes or of a woman. An impubes is altogether incapacitated from giving any valid assent, and women are incapable of appearing in the popular assembly. Antoninus Pius, however, permitted the arrogatio of an impubes under certain conditions, viz. that it should prove to be for the benefit of the impubes, that it should be agreed to by all his guardians, and that finally the pater arrogans should give security that, if the arrogatus died within the age of puberty, he would restore his property to such persons as, but for the arrogatio, would have been entitled to succeed him on his death. The arrogatio confers on the impubes, during impuberty, an indefeasible right to one-fourth share of the property left by the pater arrogans on his death (the so-called

[1] As to the meaning of the terms paterfamilias (homo sui juris) and filiusfamilias (homo alieni juris: a son, daughter, grandchild in paternal power) cp. sup. p. 120.

'quarta divi Pii'). In acquiring power over the person of the arrogatus, the pater arrogans, at the same time, acquires his property[2], and power over all those who are themselves in the power of the arrogatus. § 87.

2. *Adoption.*

Like arrogatio, adoption (in the narrower sense of the term) probably required originally the assent of all the gentes expressed in the comitia curiata[3]. But subsequently to the Twelve Tables a private juristic act was developed for the purpose of effecting such adoptions. The Twelve Tables provided that, if a father sold his son thrice into bondage, the patria potestas should be thereby extinguished. Just as this rule had supplied a device for accomplishing the emancipation of a filiusfamilias (sup. p. 32), so it might be utilized for the purpose of effecting a datio in adoptionem. The father sells his son thrice by mancipatio into bondage (mancipium, inf. p. 390). The fictitious vendee manumits the son after the first and second sale (manumissio vindicta, i. e. by means of in jure cessio, sup. p. 110). The third sale is not followed by a further act of manumission—the effect of which would be to emancipate the son (inf. p. 393)—but by the act of adoption in the form of an in jure cessio. That is to say, the adoptive father raises a fictitious 'vindicatio in patriam potestatem' before the praetor; the fictitious defendant either confesses or makes default, and the praetor thereupon awards the child to the fictitious plaintiff as his son (addictio). For the purposes of this last in jure cessio it was usual for the

[2] According to the civil law arrogatio extinguished the contractual debts of the arrogatus (p. 125). The praetor however gave an in integrum restitutio by granting an actio ficticia against the arrogatus on a fiction that no arrogatio had ever taken place. If the pater arrogans declined to take upon himself the liabilities of the arrogatus (the latter having of course ceased to have any assets himself) the praetor ordered bankruptcy proceedings to be taken in respect of such property as would have belonged to the arrogatus had no capitis diminutio taken place. Cp. p. 369.

[3] This is a reasonable inference from the fact that the private act of 'datio in adoptionem' is plainly the outcome of that interpretatio of the Twelve Tables of which we have spoken above (sup. p. 32 ff.). Hence we may conclude that, even at the time of the Twelve Tables, neither a datio in adoptionem nor an emancipatio could be accomplished by means of a private act, i. e. by virtue of mere paternal power alone. An examination of the Greek law on the subject leads to the same conclusions. Cp. Schulin, *Das griechische Testament* (1882), p. 17 ff.; F. Bücheler and E. Zitelmann, *Das Recht von Gortyn* (1885), p. 161.

§ 87. fictitious vendee first to remancipate the child to the father after the third mancipatio, the result being that the father himself was made the fictitious defendant in the datio in adoptionem, and consequently effected the adoption by means of his own confessio in jure. If the person to be adopted was a daughter or grandchild, a single sale was sufficient to extinguish the patria potestas, and the first mancipation was therefore immediately followed, not indeed by an act of manumission—which would have operated to emancipate the child—but by the act of adoption. The law of the later empire abolished these complicated ceremonies, and allowed adoptions to be accomplished by means of an agreement between the two fathers duly declared before the court in the presence of the child. The child himself is here no party to the transaction by which he is given in adoption. There are therefore no such obstacles as we found in the case of arrogatio to prevent an impubes or daughter from being adopted. The consent of the adopted child is unnecessary. No adoption, however, is valid, if it is protested against by a child who is legally capable of willing.

Under Justinian adoption, in the narrower sense of the term, ceases to produce patria potestas. Datio in adoptionem, according to Justinian's law, does not operate, in a general way, to produce the relations of father and child, but merely confers on the adopted child the same rights of succession as against the deceased adoptive father as though he were his real child (so-called 'adoptio minus plena'). It is only when the adoptive parent is a natural ascendant (e. g. the grandfather) of the child that datio in adoptionem continues to produce the full effect which formerly attached to it (so-called 'adoptio plena'). As regards arrogatio, however, its effect was not altered by Justinian.

Women are incapable of adopting. From the time of Diocletian women whose children have died are allowed to adopt by virtue of a rescriptum principis; but the only effect of this so-called adoption is to create mutual rights of intestate succession as between the adoptive mother on the one hand, and the adopted child and his descendants on the other hand.

pr. I. de adopt. (1, 11): Non solum tamen naturales liberi secundum ea quae diximus in potestate nostra sunt, verum etiam ii quos adoptamus. § 1: Adoptio autem duobus modis fit, aut principali rescripto, aut imperio magistratus. Imperatoris auctoritate adoptamus eos easve qui quaeve sui juris sunt. Quae species adoptionis dicitur adrogatio. Imperio magistratus adoptamus eos easve qui quaeve in potestate parentum sunt, sive primum gradum liberorum optineant, qualis est filius, filia, sive inferiorem, qualis est nepos, neptis, pronepos, proneptis. § 87.

§ 3 eod.: Cum autem impubes per principale rescriptum adrogatur, causa cognita adrogatio permittitur et exquiritur causa adrogationis, an honesta sit expediatque pupillo, et cum quibusdam conditionibus adrogatio fit.

§ 88. *The Effect of Patria Potestas.*

The patria potestas of the old civil law confers on the father an absolute power over those who are subject to his control, i. e. his children, the children of his sons, and his wife in manu. He has the power of life and death (jus vitae ac necis) and the power of selling into bondage. The only actual check on his absolute authority lay, on the one hand, in the influence exerted by the relations in the family council (which custom required him to appeal to in cases of gravity) and, on the other hand, in the fear of a 'nota censoria' and the spiritual punishment which was threatened in the event of an abuse of his power. Sales into bondage, where the member of a family was treated as a mere chattel representing a certain money value, must have been of tolerably frequent occurrence. An attempt to check such sales is found as early as the Twelve Tables, which contain a penal provision to the effect that a father who sells his son thrice into bondage shall be punished by forfeiting his patria potestas (sup. p. 32). In later times the mancipatio of a filiusfamilias was, as a rule, only employed for the purpose of a fictitious sale in effecting an adoption (sup. p. 387) or emancipation (inf. p. 393). Genuine sales of children only occurred in cases of noxae datio, and so far as such sales applied to filii- § 88.

§ 88. familias, they were not abolished till Justinian. That is to say, down to the time of Justinian a paterfamilias whose child committed a delict was entitled and bound, either to take upon himself the consequences of such delict, or to hand over the child by mancipatio into the bondage of the injured party (noxae datio, sup. p. 331). A child mancipated under these circumstances was said to be 'in mancipio' and stood legally in the position of a slave (servi loco), i.e. whatever he acquired, he acquired for his master and, like a slave, he could only be restored to full liberty by manumission. Justinian abolished the right of noxae datio and with it the last remnant of the paterfamilias' right of sale. The jus vitae ac necis had fallen into desuetude long before.

In the empire patria potestas no longer confers on the father the full powers of the old jus civile, but only those powers of chastisement and correction which the jus gentium recognized as naturally appertaining to the paternal authority.

As against his child, the father need not resort to legal proceedings, because the relationship of personal subordination which subsists between them confers upon the father the right of private compulsion. If he finds this right inadequate, he may invoke the assistance of the magistrate in his administrative capacity (extraordinaria cognitio). On the other hand, as against a third party, who has obtained possession of the child and is exercising power over him, the old civil law gave the father the vindicatio in patriam potestatem (filii vindicatio); at a later date the praetor granted him a remedy called the 'interdictum de liberis exhibendis,' in which the defendant was required to produce the child. If, however, the third party does not claim to have power over the child himself, but only appears in the capacity of his 'defensor' for the purpose of objecting to the so-called 'ductio,' i. e. to the father taking the child home, in such a case the father's remedy for meeting the objection of the defensor is the prohibitory 'interdictum de liberis ducendis[1].' If the existence of the patria potestas is in dispute, if, in other words, the primary object of the father is to obtain an ac-

[1] On these remedies v. Demelius, *Die Exhibitionspflicht* (1872), pp. 244–250.

knowledgment of his paternity, or his paternal power from the child or a third party, he (the father) may have recourse to a 'praejudicium,' just as, conversely, a child who denies the existence of the patria potestas may bring about a praejudicium to determine the question (sup. p. 186). § 88.

Under the old civil law the father's absolute power is not confined to the person of his child, but extends equally to his property. In fact, the effect of patria potestas is virtually to destroy the proprietary capacity of the filiusfamilas. A filiusfamilias is incapable of having any rights of property of his own. Whatever he acquires passes, by the necessary operation of the law, to the paterfamilias (so-called 'involuntary representation,' v. sup. pp. 121, 146). It was only during the empire that Roman law, in the course of its progressive development, broke through, one by one, the consequences flowing from the ancient law and gradually established the principle of the proprietary capacity of filiifamilias.

Proprietary capacity was first conceded to the filiusfamilias *miles* in respect of his so-called 'peculium castrense.' Whatever a filiusfamilias acquires in his capacity of soldier, including e. g. presents which are made to him by relatives or comrades, he acquires, not for his father, but for himself, i. e. the peculium castrense is the son's property, and he may accordingly deal with it as he chooses. He may dispose of it, either in his lifetime or by will, in the same way as a paterfamilias. It is only when the son dies intestate that the father, according to the law of the Corpus juris—which, however, was altered in this respect by the 118th Novel (v. inf. p. 446)—can claim the peculium castrense, not indeed as heres, but jure peculii, just as though it had been his (the father's) property all the time.

The privileged position of the filiusfamilias miles in respect of his peculium castrense was established at a comparatively early date, viz. by Augustus. In the later empire, after the reign of Diocletian, when the state had assumed the form of a bureaucratic monarchy, a filiusfamilias who held a public office was placed on a par with the filiusfamilias miles. Whatever he acquired in a public capacity as a civil servant, or an advocate, or a clergyman, was his peculium quasi

88. castrense, and as such was governed by the same rules as applied to the peculium castrense of the filiusfamilias miles.

The tendency of the legislation of the Emperor Constantine and his successors was to extend the application of these rules and to allow a filiusfamilias, on principle, to acquire any property as his own. In the first instance the rule was applied to 'bona materna,' or property which the child inherited from his mother. It was then extended to the so-called 'bona materni generis,' and finally to any sort of property acquired from a third party. All such property came to be denoted by the general name of 'bona adventicia.' Whatever is acquired otherwise than 'ex re patris,' or as peculium castrense or quasi castrense, is regarded as 'adventicium.' And the ownership of adventicia vests, not in the father, but in the filiusfamilias. All that is left to the father, as a remnant of his former rights, is the usufruct and the management of the bona adventicia. The powers of the filiusfamilias in respect of such property are therefore less complete than they are in respect of the bona castrensia or quasi castrensia. His inability to dispose of it inter vivos carries with it an inability to dispose of it by will. Not even the consent of the father can enable the filiusfamilias to make a valid testamentary disposition of bona adventicia. The term 'bona adventicia irregularia' is applied to adventicia over which the son has a right of management (though he cannot dispose of them after his death) and also a right of user. This happens, for example, when the donor of the property expressly excludes the father's usufruct and control, or where the son acquires property contrary to his father's will.

Thus in Justinian's law the only remaining incapacity of a filiusfamilias is that he cannot acquire anything from his father (ex re patris). Whatever a son receives from his father, even though he receive it with a free power of disposition (peculium profecticium), remains the property of the father; the son, however, has authority to deal with it and can bind his father by his contracts to the extent of the peculium given him (sup. p. 337). The peculium profecticium is a peculium of the old type and illustrates the former proprietary incapacity of the filiusfamilias and his slave-like position. The

peculium castrense and quasi castrense, on the other hand, and the bona adventicia are peculia of the new type and, as such, bear testimony, not to the original incapacity of the filiusfamilias, but rather conversely to the active proprietary capacity which the new law has gradually conferred upon him. § 88.

L. 11 D. de castr. pec. (49, 17) (Macer): Castrense peculium est, quod a parentibus vel cognatis in militia agenti donatum est, vel quod ipse filiusfamilias in militia adquisivit, quod, nisi militaret, adquisiturus non fuisset. Nam quod erat et sine militia adquisiturus, id peculium ejus castrense non est.

L. 2 D. de sc. Maced. (14, 6) (Ulpian.): . . . cum filiifamilias in castrensi peculio vice patrumfamiliarum fungantur.

§ 89. *The Extinction of Patria Potestas.*

Patria potestas is extinguished in the interests of the child who is subject to it in the following cases: under the old law, when the child becomes a flamen Dialis or virgo Vestalis; under Justinian's law, when he attains to the dignity of a bishop or patricius. It is extinguished as a punishment for the father, if he exposes his child or prostitutes his daughter. The death of the father only operates to free those who are subject to his immediate power; grandchildren by his son pass, on the death of their grandfather, under the power of their own father. Capitis deminutio media and maxima have the same effect as death (p. 122). § 89.

The juristic act by means of which patria potestas is extinguished is emancipation. The father sells his son thrice into mancipium; after each sale the fictitious vendee manumits the son (manumissio vindicta, i. e. by means of an in jure cessio, sup. p. 110). The third manumission, the effect of which is to free the son (sup. p. 31), is the act of emancipation. Hence it is usual for the fictitious vendee to remancipate the son to the father after the third mancipatio, in order that the latter may himself perform the act of manumission which effects the emancipation ('parens manumissor'). The emancipation of a daughter or grandchild can be accomplished by a single mancipatio which is immediately followed—after the

§ 89. intervening remancipatio—by the act of manumission which operates the emancipation. The law of the later empire introduced different and simpler forms, viz. emancipation per rescriptum principis (the so-called 'emancipatio Anastasiana'), and emancipation by entry on the judicial records (the so-called 'emancipatio Justiniana').

The child is no party to the act of emancipation. His consent is not required. Nevertheless, if he protests, the emancipation is, in Justinian's law, void, except where it is intended to dissolve a mere adoptive relationship. A child cannot claim to be emancipated as a matter of right, except in certain cases an impubes arrogatus. Even when the child is grown up and holds offices of dignity[1], he remains legally in the power of his father as long as the latter does not, of his own free will, dissolve the relationship. The paternal power of Roman law is a power which exists entirely in the interests of the father, and does not, therefore, depend for its continuance on the child's need of protection and his educational requirements, but simply on the life of the father. The view taken by modern systems is a different one. Acting on the Teutonic conception of paternal power, they hold that as soon as the child becomes practically independent (separata oeconomia), the power of the father is ipso jure extinguished (the so-called 'emancipatio Saxonica').

A child, by being emancipated, undergoes capitis deminutio minima, because he severs his previous agnatic relationship (p. 125). The emancipated child is the head of a new family. According to the civil law he has no relations, until he has made a new agnatic relationship for himself by begetting children after the emancipation.

> Gaj. Inst. I § 132: Praeterea emancipatione desinunt liberi in potestate parentum esse; sed filius quidem tribus mancipationibus, ceteri vero liberi, sive masculini sexus, sive feminini, una mancipatione exeunt de parentum potestate. Lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis: SI PATER FILIUM TER VENUMDUIT, A PATRE FILIUS LIBER ESTO. Eaque res ita agitur: mancipat pater filium alicui, is eum vindicta manu-

[1] It was only by attaining to certain high dignities (see the beginning of this section) that a child was released from the patria potestas.

mittit. Eo facto revertitur in potestatem patris. Is eum iterum mancipat, vel eidem, vel alii: sed in usu est, eidem mancipari. Isque eum postea similiter vindicta manumittit. Quo facto cum rursus in potestatem patris fuerit reversus, tertio pater eum mancipat, vel eidem, vel alii: sed hoc in usu est, ut eidem mancipetur: eaque mancipatione desinit in potestate patris esse. § 89.

§ 6. 7 I. h. t. (1, 12): Nostra autem providentia et hoc in melius per constitutionem reformavit, ut, fictione pristina explosa, recta via apud competentes judices, vel magistratus parentes intrent et filios suos, vel filias, vel nepotes, vel neptes ac deinceps sua manu dimitterent.—Admonendi autem sumus, liberum esse arbitrium ei qui filium et ex eo nepotem vel neptem in potestate habebit, filium quidem de potestate dimittere, nepotem vero vel neptem retinere, et ex diverso filium quidem in potestate retinere, nepotem vero vel neptem manumittere vel omnes sui juris efficere.

L. 3 § 1 D. de capite minutis (4, 5) (Paulus): Emancipato filio . . . capitis minutio manifesto accidit, cum emancipari nemo possit, nisi in imaginariam servilem causam deductus.

III. Guardianship.

§ 90. *The Different Kinds of Guardianship.*

§ 90. The power of a guardian is that form of family power which takes the place of paternal power when there is no one to exercise the latter.

Roman law distinguishes two kinds of guardianship, viz. tutela and cura. Tutor and curator are both alike charged with the care of the person as well as the property of the ward. The principle of the distinction, however, lies in the position which they respectively occupy in regard to the ward's property.

The essence of tutela is the so-called 'auctoritatis interpositio,' i. e. the assistance of the tutor which is required for the conclusion of juristic acts. If, namely, the tutor gives his consent immediately at the time of the transaction, he thereby renders the ward capable

§ 90. of concluding the act himself. The principle of tutela is that it supplies a method by which a person of imperfect capacity of action is, so to speak, cured of this incapacity. Auctoritatis interpositio *may* be accompanied by the right of 'gestio' or administration, i. e. the right to make all such dispositions on behalf of the ward as are necessary for the general management of the property (a right of representation); but such a right is in no way essential to tutela.

Tutela is employed in two cases: firstly, in the case of impuberes (tutela impuberum); secondly, in the case of women (tutela mulierum). In the former the tutor has, in the latter he has not, the right of gestio.

The essence of cura, on the other hand, is the right of administration (gestio), i. e. the right to deal with the ward's property in his (the ward's) stead. The purpose of a cura is to exclude a person who is incapable of administering his property from such administration. The curator is, at the same time, the guardian and representative of his ward. There can be no curator without gestio. On the other hand, a curator has no auctoritatis interpositio, i. e. he cannot enable a person of imperfect capacity of action to act himself in spite of such incapacity.

In Roman law there are three cases of cura: (1) the cura minorum (over persons of complete capacity of action); (2) the cura prodigi (over persons of imperfect capacity of action); (3) the cura furiosi (over persons of complete incapacity of action).

If we bear in mind the principles just set out, we shall be able to determine at once what form guardianship assumes in Roman law in each separate case where it occurs.

I. *Guardianship of Minors.*

In the guardianship of minors we distinguish two stages: (1) the tutela impuberum; (2) the cura minorum.

(1) Tutela Impuberum.

In the tutela impuberum either the tutor acts on behalf of the ward (by virtue of his right of gestio), or the ward himself acts, if no longer infans, with the assistance of the tutor. Such assistance, however, is only required when the effect of the transaction is to alienate

property or to impose a liability; for an impubes infantia major is fully capable of concluding acts by which he acquires something without the co-operation of the tutor (sup. p. 141). § 90.

(2) Cura Minorum.

The lex Plaetoria (about 186 B.C.) allowed a pubes minor XXV annis, who was fatherless, to apply on special grounds to the magistrate (the praetor) for a curator. Afterwards such applications came to be regularly made even without any special grounds. A minor pubes enjoys complete capacity of action, nor does the fact that he has a curator do away with such capacity; the effect of the appointment of the curator, however, is to deprive the minor of his capacity of *disposition*; in other words, the right to administer his property passes from him to the curator. All acts by which the minor improves his position are valid at once in the same way as they were before, but if he wishes to bind his property effectually by alienation or by a contract subjecting him to a liability, he must obtain the consent of his curator, which consent may be given before, during, or after the transaction (cp. pp. 142, 143).

pr. I. de auct. tut. (1, 21) v. sup. p. 142.

pr. I. de curat. (1, 23): Masculi quidem puberes et feminae viri potentes usque ad vicesimum quintum annum completum curatores accipiunt: quia licet puberes sint, adhuc tamen hujus aetatis sunt, ut negotia sua tueri non possint.

§ 2 eod.: Item inviti adulescentes curatores non accipiunt, praeterquam in litem: curator enim et ad certam causam dari potest.

II. *Tutela Mulierum.*

In Roman law—even down to the classical period—every woman, though she be adult, who is not in patria potestate or in manu mariti, is, on account of her sex, subjected to the guardianship of a tutor, and is thus incapacitated from effectually binding herself by any transaction, and from concluding any negotium juris civilis (such as mancipatio, in jure cessio, or a will) without the concurrent interpositio auctoritatis of her tutor. The management of her property is in the woman's own hands, for a tutor mulieris has no

§ 90. gestio; but wherever such management brings with it the necessity for transactions of the kind just described[1], a woman cannot effectually act, unless her tutor gives his consent in praesenti Nevertheless the restraint involved in this rule had sunk to a mere form as early as the classical period. If the tutor refused to give his auctoritas voluntarily, the woman had the power to compel him. The only tutor who was not thus compellable and whose power was therefore a genuine one, was the tutor legitimus. But this very tutela legitima (in which the whole institution of the guardianship of women originated) had already been stripped of all practical importance by a lex Claudia (under the empire) which abolished agnatic guardianship[2].

The whole system of tutelae mulierum disappears in the post-classical age.

Ulp. tit. 11 § 1: Tutores constituuntur tam masculis, quam feminis; sed masculis quidem impuberibus dumtaxat propter

[1] Since the old civil law knew of no other juristic acts but negotia juris civilis, women were, in the early times, necessarily debarred from concluding any juristic act by themselves.

[2] Tutela legitima mulierum is the name for three forms of the guardianship of women which were based on the Twelve Tables and their interpretatio. These three forms were (1) the guardianship of agnates (over unmarried female relations), (2) the guardianship of a patronus (over an unmarried liberta), (3) the guardianship of a parens manumissor (over his unmarried emancipated daughter or granddaughter, v. p. 393). The most important of these was the tutela legitima agnatorum, and this was the very one which the lex Claudia abolished. The legal position of a tutor legitimus mulieris was characterised by two rules: (1) he had the right to refuse his auctoritas for the purpose of enabling a woman to execute a will, to alienate by mancipatio, or to incur an obligation by negotium civile (praeterquam si magna causa interveniat). But inasmuch as he had no power to prevent his ward's marrying, the latter could release herself from his guardianship by means of a marriage with manus. This was the origin of the so-called 'coëmtio fiduciae causa,' which was simply carried out 'tutelae evitandae causa.' The woman contracted a fictitious marriage by coëmtio with a third party, who was bound by the fiducia, or trust-clause, to release her from the marriage by remancipation (p. 382), the effect being that the manumissor became the tutor of the woman (a so-called 'tutor fiduciarius'), but a tutor who, not being a tutor legitimus, had no power to veto her acts. (2) A tutela legitima mulierum could be assigned by in jure cessio to a third party called a 'tutor cessicius.' A tutela cessicia however terminated with the death or capitis deminutio not only of the tutor cessicius, but also of the cedens. This restricted operation of the in jure cessio by which all that was transferred was, in effect, the management of the guardianship business, confirms the conclusion to which we are led by other facts, viz. that the in jure cessio tutelae belongs to a more advanced period where an absolute assignment of the guardianship itself is excluded even in the case of a tutela legitima mulieris. Cp. sup. p. 32, n. 4.

aetatis infirmitatem, feminis autem tam impuberibus, quam puberibus, et propter sexus infirmitatem, et propter forensium rerum ignorantiam. § 90.

Eod. § 25: Pupillorum pupillarumque tutores et negotia gerunt, et auctoritatem interponunt, mulierum autem tutores auctoritatem dumtaxat interponunt.

Eod. § 27: Tutoris auctoritas necessaria est mulieribus quidem in his rebus: si lege, aut legitimo judicio agant, si se obligent, si civile negotium gerant, si libertae suae permittant in contubernio alieni servi morari, si rem mancipii alienent; pupillis autem hoc amplius etiam in rerum nec mancipii alienatione tutoris auctoritate opus est.

Gaj. Inst. I § 190: Mulieres, quae perfectae aetatis sunt, ipsae sibi negotia tractant, et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; saepe etiam invitus auctor fieri a praetore cogitur.

III. *Cura Furiosi.*

The cura furiosi empowers and binds the curator to administer the property of a lunatic on his behalf.

IV. *Cura Prodigi.*

The cura prodigi differs from the cura furiosi in that, in this case, the ward (the prodigus) is capable of performing any act by which he merely acquires something. The appointment of the curator, however, precludes him from making any valid alienation or binding himself by any transaction; all such acts, in order to be effectual, must be concluded by the curator on behalf of the prodigus.

V. *Special Cases of Curae.*

In special circumstances a curator with limited authority may be appointed, e. g. for persons incapacitated by illness or old age (cura debilium personarum), or for the purpose of assisting a tutor who is already acting.

§ 91. *The Appointment of Guardians.*

I. The Modes in which Guardians are appointed.

(1) *Tutela.*

The office of tutela may devolve on a person in one of three ways:

§ 91. (1) by statute ('tutela legitima'); (2) by will ('tutela testamentaria'); (3) by magisterial appointment ('tutela dativa').

(*a*) Tutela Legitima (Statutory Guardianship).

The tutela legitima devolves on the nearest heir of the ward who is capable of acting as guardian. At civil law, therefore, it devolves on the nearest agnate, and in default of agnates on the nearest gentilis. The reform of the law of inheritance which was carried out under the later empire involved the necessity of reforming, at the same time, the law of statutory guardianship. In the law of Justinian the statutory guardianship devolves on the nearest *cognate* of the ward who is capable of acting as guardian.

(*b*) Tutela Testamentaria (Testamentary Guardianship).

Patria potestas, as well as manus mariti, implies a power to exclude the tutela legitima by the testamentary appointment of a guardian (tutela testamentaria). Such an appointment can be made by the father either in the will itself or in a codicil confirmed by the will (cp. inf. end of § 102). When, however, the father appoints a testamentary guardian by unconfirmed codicil, or appoints one to an emancipated child, or lastly, when a testamentary guardian is appointed by a third party (e. g. the mother), in all such cases the appointment must be ratified by the magistrate (confirmatio). In the first two cases however (where the father is the appointor) the confirmation is a mere form, being granted at once 'sine inquisitione,' but in any other case confirmation is only granted 'ex inquisitione' and is discretionary.

(*c*) Tutela Dativa (Magisterial Guardianship).

In default of both tutor legitimus and tutor testamentarius the magistrate has the right to appoint a guardian (tutela dativa). This right was conferred on the praetor urbanus by the lex Atilia, which only applied to the city of Rome, and required the praetor to consult the tribunes, or at least of a majority of them. A tutor thus appointed was called a tutor Atilianus. Analogous powers, as regards the provinces, were subsequently conferred on the praeses provinciae by the lex Julia et Titia. At a later time special 'praetores tutelares' were nominated in Rome, and other magistrates (consuls, municipal magistrates) were invested by statute with the

power of 'tutoris datio.' The nearest heirs ab intestato of the ward, and more especially his mother and grandmother, are bound to apply to the magistrate for a tutor dativus (postulatio tutoris), on penalty, in default, of forfeiting their rights of intestacy, if the ward dies within puberty. § 91.

Ulp. tit. 11 § 14: Testamento nominatim tutores dati confirmantur lege duodecim tabularum his verbis: UTI LEGASSIT SUPER PECUNIA TUTELAVE SUAE REI, ITA JUS ESTO: qui tutores dativi appellantur.

§ 3 I. de tut. (1, 13): Permissum est itaque parentibus, liberis impuberibus, quos in potestate habent, testamento tutores dare. Et hoc in filio filiaque omnimodo procedit, nepotibus tamen neptibusque ita demum parentes possunt testamento tutores dare, si post mortem eorum in patris sui potestatem non sunt recasuri.

(2) *Cura.*

Curatores are, on principle, appointed by the magistrate. Even the cura legitima of the nearest agnates (or gentiles) over a furiosus and over a prodigus who has squandered the property he inherited ab intestato, had to be expressly granted by the decree of the praetor.

Ulp. tit. 12 § 1: Curatores aut legitimi sunt, id est qui ex lege duodecim tabularum dantur, aut honorarii, id est qui a praetore constituuntur. § 2: Lex duodecim tabularum furiosum, itemque prodigum, cui bonis interdictum est, in curatione jubet esse agnatorum. § 3: A praetore constituitur curator, quem ipse praetor voluerit, libertinis prodigis, itemque ingenuis, qui ex testamento parentis heredes facti male dissipant bona: his enim ex lege curator dari non poterat, cum ingenuus quidem non ab intestato, sed ex testamento heres factus sit patri, libertinus autem nullo modo patri heres fieri possit, qui nec patrem habuisse videtur, cum servilis cognatio nulla sit. § 4: Praeterea dat curatorem ei etiam qui nuper pubes factus idonee negotia sua tueri non potest.

II. Qualifications of Guardians.

In order to be able to serve the office of guardian, a person must have the necessary qualifications. An unqualified person, even

§ 91. though duly appointed (e. g. by a father in his will), is not allowed to act. The following persons are disqualified in Roman law: aliens, women, and persons requiring guardianship themselves. With regard to women, however, a widowed mother or grandmother may apply to the magistrate for the tutela of her children, who are impuberes, during her widowhood.

L. 18 D. de tut. (26, 1) (NERATIUS): Feminae tutores dari non possunt, quia id munus masculorum est, nisi a principe filiorum tutelam specialiter postulent.

§ 13 I. de exc. tut. (1, 25): Minores autem XXV annis olim quidem excusabantur; a nostra autem constitutione prohibentur ad tutelam vel curam aspirare . . . cum erat incivile eos qui alieno auxilio in rebus suis administrandis egere noscuntur et sub aliis reguntur, aliorum tutelam vel curam subire.

III. The Effect on the Guardian of his Appointment to the Office.

As soon as the office of guardian devolves upon a person it takes effect, on principle, ipso jure, i. e. a person, on being appointed a guardian, thereby becomes guardian at once. He is not entitled to decline the guardianship. The taking of a guardianship is a munus publicum. It is only on the ground of certain 'excusationes,' specified by statute, that a person on whom the office has devolved, and who is therefore, on principle, fully charged with its rights and duties, can obtain exemption, and this only if he states his title to exemption to the magistrate within a prescribed time.

The testamentary guardian alone is at liberty to decline the office at his own free will. A tutor or curator who is appointed by the praetor can escape the guardianship by nominating another person on whom the duty of acting is more properly incumbent ('potioris nominatio').

L. 5 § 10 D. de adm. tut. (26, 7) (ULPIAN.): Ex quo innotuit tutori se tutorem esse, scire debet periculum tutelae ad eum pertinere.

L. 1 § 1 eod. (ULPIAN.): Id enim a divo Marco constitutum est, ut qui scit se tutorem datum, nec excusationem, si quam habet, allegat intra tempora praestituta, suo periculo cesset.

§ 91. pr. I. de exc. tut. (1, 25): Excusantur autem tutores vel curatores variis ex causis. Plerumque autem propter liberos, sive in potestate sint sive emancipati. Si enim tres liberos quis superstites Romae habeat, vel in Italia quattuor, vel in provinciis quinque, a tutela vel cura potest excusari.

§ 16 eod.: Qui excusare se volunt, non appellant, sed intra dies quinquaginta continuos, ex quo cognoverunt, excusare se debent, . . . si intra centesimum lapidem sunt ab eo loco, ubi tutores dati sunt. Si vero ultra centesimum habitant, dinumeratione facta viginti millium diurnorum et amplius triginta dierum. Quod tamen, ut Scaevola dicebat, sic debet computari, ne minus sint quam quinquaginta dies.

Fragm. Vat. § 157: Tunc demum excusandus est, qui prius datus fuerat, si is quem nominaverit, et potior necessitudine et idoneus re fideque nec absens deprehendatur.

§ 92. *The Effect of Guardianship.*

§ 92. The effect of guardianship is, on the one hand, to confer a certain power on the guardian, and on the other hand, to impose certain duties on him.

I. The Power of a Guardian.

The special power of a guardian consists in the authority to act on behalf of the ward. This power depends upon the extent of his gestio, i. e. on the extent of his right of administering the ward's property. A tutor as such, therefore, need not necessarily have any such power at all. On the other hand, a curator as such must always possess such an authority. A guardian who has the right of gestio has prima facie power to conclude any juristic act on behalf of his ward, and to bind him by such act. An exception however is made in the case of gifts; and in regard to praedia rustica and suburbana belonging to the ward, their alienation by a guardian was prohibited by an oratio divi Severi (A. D. 195). This prohibition was subsequently extended to all more important acts of alienation except such as form part of the current business of administration. In order to render the alienation valid in such cases a special decree from the state as guardian-in-chief is required.

One ward may have several guardians, e. g. by appointment under

§ 92. a will, or in consequence of several relations standing in the same degree of proximity. In such cases each single guardian has prima facie full power to act on behalf of the ward. But the very object of appointing several guardians may be to divide this power by restricting that of each guardian, say, to a certain branch of business or to a certain locality. Or again, it may be intended to confer the power—and in such cases it must of course be plenary power—on one single guardian. Such a guardian is called a 'tutor gerens.' The other guardians, who have no power, are called 'tutores honorarii.' But the absence of any power to act (gestio) does not deprive a tutor of his right of auctoritatis interpositio. Though a tutor honorarius cannot act in lieu of the ward, he can, by means of his auctoritas, enable the ward to act himself. The auctoritatis interpositio, as such, neither presupposes nor does it involve any power to act in the ward's stead[1].

L. 1 pr. D. de reb. eor. (27, 9) (Ulpian.): Imperatoris Severi oratione prohibiti sunt tutores et curatores praedia rustica vel suburbana distrahere.

L. 22 § 6 C. de adm. tut. (5, 37) (Constantin.): Jam ergo venditio tutoris nulla sit sine interpositione decreti; exceptis his dumtaxat vestibus, quae detritae usu, aut corruptae servando servari non poterint. § 7: Animalia quoque supervacua minorum, quin veneant, non vetamus.

II. The Duties of a Guardian.

The entering on the guardianship binds the guardian to exercise care in the conduct of all matters appertaining to his office. It is his duty to do everything that is reasonably required, in the interests of the ward, for the purpose not only of preserving, but also of increasing the ward's property, e. g. by making suitable purchases of land, or by putting out money at interest, or by carrying on the

[1] Hence a tutor gerens, whose power is only partial, is nevertheless a tutor honorarius (with the right of auctoritatis interpositio) in respect of all the acts of his ward. But the only effect of auctoritatis interpositio as such is to give formal validity to the act. The right to determine whether an alienation or a contract shall be made at all, is part of the right of gestio.—Hence the auctoritatis interpositio of a tutor honorarius is not sufficient to secure the material validity of any such disposition. Cp. Puchta, *Vorlesungen* § 352.—As to the difference between auctoritas and gestio v. A. Pernice, *Labeo*, vol. i. p. 184 ff.

business belonging to the ward. The guardian is bound to do § 92.
all acts of this kind, in order that the interests of the ward may be as efficiently attended to as though the ward were himself in a position to undertake the management of his property. A guardian, however, is only answerable for the diligentia quam suis rebus (sup. p. 319). As he does not undertake his office voluntarily, but in pursuance of a duty cast on him by the law, it is sufficient if, in guardianship matters, he shows the same degree of care as he does in his own. But if he should fall short of this standard, he is liable to the ward in damages. He would, of course, be equally liable if he were to make important dispositions of the ward's property without a magisterial decree, in other words, in excess of his powers, or if he were to misappropriate the ward's property or convert it to his own use, and so forth. And with a view to securing wards in their claims for damages against guardians, the latter are bound (except in certain specified cases)[2], on entering on their guardianship, to give security for proper administration (rem pupilli salvam fore) by means of sureties or pledges. Under the law of the later empire the ward has even a statutory hypothec over the entire estate of his guardian.

On the termination of the guardianship, the guardian is moreover bound to render an account of his administration and to hand over the ward's property to the ward.

The remedy by which a ward can compel his guardian to a due performance of his duties is the actio tutelae directa, an action condemnation in which, according to Roman law, entails infamy (sup. p. 128). If there are several guardians, each of them is liable for the whole amount, i. e. their obligation is solidary (sup. p. 282, and n. 5 *ibid.*); but where the powers are divided, or where the entire power is vested in a single guardian, the liability attaches, in the first instance, to the guardian who was empowered to act and was primarily answerable. The liability of the others is merely subsidiary. In addition to the guardians themselves, a subsidiary liability also attaches to the 'postulatores' ('nominatores'), or persons who proposed the guardian; the 'affirmatores,' or persons

[2] A guardian appointed by the ward's father or by a superior magistrate is not required to give such security.

§ 92. who asserted his fitness for the office, in the magisterial enquiry; and lastly to the magistrate himself—though in Roman law only to a magistratus minor, e. g. a municipal magistrate—who failed to exercise proper care in the appointment or supervision of the guardian.

If the guardian converts any of the ward's property to his own use, the remedy is by 'actio rationibus distrahendis,' which is an action in duplum, the ward claiming both damages and a penalty.

On the other hand, if the ward fails to recoup his guardian for disbursements, the guardian has the actio tutelae contraria.

In the case of a cura, the parties have the same remedies as they would have under a negotiorum gestio (v. sup. p. 318).

'Protutor' is the name given to a person who (whether he believed himself a guardian or not) has acted as a guardian without being one, or to a person who, being really a guardian, has acted as one without knowing it. The actions against and by a protutor are called the actio protutelae directa and contraria respectively.

> L. 1 pr. D. de tut. (27, 3) (Ulpian.): In omnibus quae fecit tutor, cum facere non deberet, item in his quae non fecit, rationem reddet hoc (tutelae) judicio, praestando dolum, culpam, et quantam in suis rebus diligentiam.

§ 93. *Termination of Guardianship.*

§ 93. Guardianship terminates (apart from the death or capitis deminutio of guardian or ward), as a rule, ipso jure with the disappearance of the ground which called it into existence, e. g. with the majority of a ward, or the recovery of a lunatic; the cura prodigi however only terminates with a magisterial decree cancelling the guardianship on the ground of a return to prudent habits.

Guardianship may also be terminated through the removal of the guardian by the state as guardian-in-chief. Such a removal is either a simple one, i. e. it takes place on the ground that the guardian is not fit to discharge his functions (so-called 'excusatio necessaria'), or it is an ignominious one, entailing infamy in Roman law, if occasioned by dolus, i. e. it takes place on the ground that the guardian

is suspected of misconduct (so-called 'remotio suspecti tutoris'). Any one is entitled to make the accusatio suspecti tutoris; the duty to do so, rests on the fellow-guardian. § 93.

In the classical period a tutor testamentarius was permitted to resign his office at will (abdicatio tutelae), but in Justinian's law no resignation is allowed except on specific grounds, such as poverty, deafness, blindness, and subject to the discretion of the magistrate.

§ 94. *The State as Guardian-in-Chief.*

The state is guardian-in-chief in the sense that all other guardians are subject to its supervision and control. Already in Roman law we find that the state sees to the due installation of the guardian, to his giving the requisite security against maladministration, and to his causing an inventory of the guardianship property to be made. In some cases, as we have seen (sup. p. 400), the state appoints the guardian; its sanction is always necessary in order to validate any important alienation of the ward's property (p. 403); and in certain circumstances it performs the office of removing a guardian or accepting his resignation. The functions of the state as guardian-in-chief have been considerably enlarged in the German Pandect law, and the judicial department which, in these matters, represents the state (the 'Obervormundschaftsbehörde') has been developed into a power superintending and controlling the entire management of all guardianships. § 94.

CHAPTER II.

The Law of Inheritance.

§ 95. *Hereditary Succession; its Foundation and Conception.*

§ 95. The fundamental idea which lies at the root of proprietary rights and proprietary liabilities (obligations) is the idea of immortality. An owner may die, but his ownership survives him. A debtor may pass away, but his debt remains. In this respect the rights and duties of private law, on the one hand, differ from those of public and family law, on the other hand; for it is a principle of the rights and duties incident to public and family law that they perish with the person to whom they are attached. There are, it is true, certain private legal relations—such as a usufruct or a penal liability for a delict—which, by their very nature, are bound up with a particular person, and which consequently perish with the death of that person. But the fundamental characteristic of a private right and a private liability, as such, is that they can survive their subject and can pass to a new subject. Property is not destroyed by the death of the proprietor.

And the reason is this. Though the individual may die, the family survives. In the oldest times the family is the sole owner; individual ownership is unknown and common ownership is the only recognised form. The common ownership of the family developed, in the course of time, into the common ownership of the community, on the one hand, and the private ownership of the individual, on the other. The rights given to the family in the law of inheritance testify to the influence of the original conception of family ownership on the law of private ownership. The death of the individual

does not remove the true owner of the property, because the family continues to exist. The individual holder of the property dies, but his family survives him and, through it, his property. § 95.

The title of the relatives of the deceased, and more especially of his own children, to succeed him on his death, is based on a rule of law, on a legal necessity, on the fact that, prior to his death, they were co-owners of the property. In the course of time, however, the idea of private ownership was destined to outstrip the traditional conception of family ownership, and the individual was allowed, through the medium of a will, to realize his absolute right of disposition (i. e. his sole ownership) as against the family even after his death. In the earliest times there is only intestate succession. At a later period we find intestate opposed to testamentary succession. Nevertheless the associations of the old family ownership are still clearly traceable. The claims of certain very near relations are so strong that they survive the recognition of individual ownership. The view moreover asserts itself that the interests of a man's nearest relations are, in a sense, also the interests of the community; that it is a matter of public concern that the nearest relations, who depend for their existence on the deceased, should not be deprived of his property without sufficient cause. The result of the working of these ideas is that, concurrently with the development of testamentary succession, the view that there may be a succession *contrary to the will*, a 'succession by necessity,' gains acceptance. In the old law these rules concerning succession by necessity mark the limits within which the conception of family ownership continues to operate on that of individual ownership. In the later law, as shaped by legislation, the rules concerning succession by necessity govern the entire field within which the interests of the family are regarded as identical with the interests of the state. Testators are compelled, to some extent, to satisfy the just demands of their nearest relatives. Just as the rules of intestacy bear witness to the primeval rights of the family, and the rules of testamentary succession to those of the individual, so the rules on succession by necessity give expression to the coincidence, within certain limits, of the interests of the family with those of the state.

§ 95. According to the original idea, which rejects all claims to succession except those of the family, the heir appointed in the will is, so to speak, received into the family by means of a juristic act. For the family represents the force by which, on the death of the individual, the property is saved from perishing, and is thus the source and foundation of the rights of succession and the rules of hereditary devolution.

In Roman jurisprudence hereditary succession takes the form of *universal succession*. That is to say, the estate of the deceased is preserved in its entirety, with all its rights and liabilities, and passes in its entirety to the heir or heirs. It was this conception of universal succession which enabled the Roman law of inheritance to vindicate its inherent superiority, as a logical system, over the German law of inheritance, and which—after the 'reception' of Roman law—caused the German ideas of hereditary succession to be displaced in favour of those which Roman law had introduced. German law never advanced beyond the somewhat primitive notion of the earliest times, the notion of 'singular succession,' according to which, on the death of a person, his property is broken up and distributed piecemeal among his heirs. The bolder genius of Roman law, starting, like German law, with singular succession, successfully worked its way to the maturer conception of universal succession. In Roman law the property of a deceased person is not physically divided, and scattered among his heirs. It remains absolutely one. Each heir takes, on principle, the whole estate. If several heirs enter on the inheritance, and consequently 'concursu partes fiunt,' the inheritance is proportionately divided into ideal parts. No heir can succeed to a separate thing belonging to the estate of the deceased. Hereditary succession, as such, can only take place in respect of *the estate*, i. e. in respect of the whole mass of rights and obligations which are left by a person on his death.

The doctrine of universal succession acquires practical importance in its application to the question of the transmission of liabilities. And it is certain that Roman law, in evolving the conception of universal succession, which was destined to dominate the whole sphere of the law of inheritance, started from this very question concerning

the debts of the deceased. For if, on a man's death, his property is distributed piecemeal, a grave question arises as to what is to happen to his debts. The doctrine of singular succession must endanger the rights of those who have claims against an inheritance. But where the whole mass of rights and obligations passes in its entirety to the heir or heirs, the matter stands very differently. If there is but one heir, he will take the whole estate subject to all its liabilities, and if there are several heirs, each heir will take his aliquot share subject to an aliquot share of the debts—provided of course the debts are divisible; otherwise all the heirs will be liable in solidum, each of them being answerable for the whole. § 95.

Another question, however, remains to be settled. Shall the heir's liability for the debts of the deceased be limited to the amount of the inheritance, or shall it also extend to his own property? The principle of singular succession necessarily implies the former alternative. On the other hand, the principle of universal succession, though not necessarily involving the second alternative, nevertheless points to it as a possibility, and it is most characteristic of the Roman law of inheritance, that, in elaborating the conception of universal succession, it decided in favour of the second alternative, by adopting the view that the heir must be made answerable for the debts of the deceased, if necessary, with his own property. In other words, the heir is answerable in the same manner as though he had contracted the debts himself, or, to put it still more plainly, he is answerable in the same way as though he were the deceased himself.

This rule contains the pith of the Roman conception of universal succession. Hereditary succession, in Roman law, does not mean a succession to separate rights or liabilities—which would be a singular succession—nor does it mean a mere succession to an estate as a whole—which would be a universal succession in the wider meaning of the term. It means primarily a succession to the personality of the deceased, regarded as the subject of proprietary rights and liabilities. This is what is meant by universal succession in the technical sense of the law of inheritance. In other words, as far as

§ 95. private law is concerned, i. e. as far as any questions of ownership, debt, and so forth, arise, the heir is treated as though he were the deceased. In his capacity of heir he represents the deceased, whose rights and liabilities are therefore, in an equal measure, his. The heir, as such, is absolutely one with the deceased. In contemplation of private law, therefore, the deceased continues to live in the person of the heir. This is what we mean by saying that in Roman private law a man's private personality—whether as owner or debtor—is immortal. In the luminous reasoning of Roman jurisprudence the idea of the indestructibility of proprietary rights and liabilities, the material foundation of which lies, as we have seen, in the continued existence of the family, is presented to us in the light of a mere logical conclusion flowing naturally from the conception of the immortality of the person.

The antithesis between universal succession—in the full sense of the term, as developed in the Roman law of inheritance—and singular succession, is thus clearly and fully brought out. In the case of a singular succession, or succession to a single article of property, the same legal relationship passes from one subject to another; in the case of a universal succession, the subject of the legal relationship remains the same. The essence of universal succession is that it is not, strictly speaking, a *succession*, but a *continuation*, i. e. the same legal relationship does not attach successively to a series of subjects, but continues to attach to one and the same subject. It is in this sense that we speak of universal succession being a succession to a personality, and of singular succession being a mere succession to a right. The practical difference between the two forms of succession finds expression in the rule that a singular succession, on principle, only passes rights and not debts, whereas a universal succession (within the meaning of the law of inheritance) passes both rights and debts, and passes the latter in such a way as to constitute them the debts of the heir himself, so that the original contractor of the debts (i. e. the deceased) appears before the creditors in the person of the heir.

The interests of the creditors of the deceased's estate supplied the guiding principle upon which the development of the Roman

law of inheritance proceeded. The interests of the creditors, § 95.
however, are in truth identical with those of the debtor himself. For the recognition of the immortality of the debtor's person—which results from the devolution of his estate—at once puts the debtor in a position to obtain *credit*. Personal credit, or credit which is given to a man personally, is thereby rendered possible; for even though the debtor should die, his person will remain, and the continued existence of his personality is thus, for all purposes of private law, secured against the accidents of this life.

It is in this sense that we describe universal succession (i. e. succession to the personality of the deceased as the subject of proprietary relations) as the essence of hereditary succession.

L. 62 D. de R. I. (50, 17) (JULIAN.): Hereditas nihil aliud est quam successio in universum jus, quod defunctus habuerit. And, to the same effect, GAJUS in l. 24 D. de V. S. (50, 16).

L. 37 D. de adq. her. (29, 2) (POMPONIUS): Heres in omne jus mortui, non tantum singularum rerum dominium succedit, cum et ea, quae in nominibus sint, ad heredem transeant.

§ 96. *Delatio and Acquisitio of the Hereditas.*

The offer of the hereditas we call delatio; the vesting of the § 96.
hereditas we call acquisitio. The person to whom the hereditas is offered is thereby nominated heir; the person who acquires the hereditas thereby becomes heir.

I. *Delatio Hereditatis.*

The person to whom delatio shall be made is determined in Roman law in a threefold manner: firstly, by operation of the law, when a man dies intestate; secondly, by operation of a will, when a man dies testate; thirdly, by operation of the law *overriding* a will, when succession by necessity takes place (sup. p. 409). Testamentary succession takes precedence over intestate succession, and succession by necessity, in its turn, over testamentary succession. Succession by necessity has not always the effect of making the whole will void; under certain circumstances it may operate concurrently with the will, the estate of the deceased thus devolving partly by

§ 96. virtue of the will, partly by virtue of a rule of law conflicting with the will. On the other hand, testate and intestate succession are, in Roman law, mutually exclusive. If a man makes a will, he must do so in respect of all his property; he cannot dispose of part only and leave the rest to devolve on his heirs ab intestato. If a testator does not, to begin with, institute his heir to the entire inheritance, or if some of his testamentary heirs fail to take, by reason either of disclaimer or of death prior to the vesting of the estate, in either case the whole inheritance goes to the testamentary heirs, and the parts which are undisposed of, or have lapsed, accrue to them in the ratio of their shares of the estate. If an heir is instituted at all, he is thereby instituted to the whole estate. The mere intention of the testator—say, that he should only take one fourth—is not in itself sufficient to curtail his right, which can only be limited by the competing claims of co-heirs. The testator is of course at liberty to determine the amount of the shares which each of his heirs shall take, but his mere intention, without more, is not enough to confine the right of the heir to a fraction of the estate. For the institution of the heir is, in this sense too, a successio in *universum* jus defuncti. It is highly probable that this rule is historically associated with the fact that in Rome, as well as in Greece and Germany, wills took their origin from the practice of adoption (inf. § 99 I), and adoption, from the very nature of it, operates on the entire estate of the person adopting. Hence the rule: Nemo pro parte testatus, pro parte intestatus decedere potest.

L. 151 D. de V. S. (50, 16) (Terentius Clemens): Delata hereditas intellegitur, quam quis possit adeundo consequi.

L. 39 D. de adq. her. (29, 2) (Ulpian.): Quamdiu potest ex testamento adiri hereditas, ab intestato non defertur.

L. 7 D. de R. I. (50, 17) (Pomponius): Jus nostrum non patitur eundem in paganis et testato et intestato decessisse: earumque rerum naturaliter inter se pugna est, testatus et intestatus.

II. *Acquisitio Hereditatis.*

In Roman law an inheritance is 'acquired' in two different ways, according as the heir is a member of the household of the deceased

(a 'heres domesticus'), or a stranger to the household (a 'heres extraneus'). In the case of a heres domesticus, who, in the eye of the law, already belongs to the household, an express act of taking possession is not required, and the inheritance devolves on him ipso jure, without any act of entry ('aditio') on his part; in other words, he is a 'heres necessarius.' On the other hand, in the case of a heres extraneus, who stands legally outside the household and requires to be admitted to it, an express act of aditio, i.e. a manifestation of his will, is necessary for the vesting of the inheritance; he is a 'heres voluntarius'[1]. § 96.

1. *Heredes domestici.*

There are three classes of heredes domestici:

(*a*) The most important class are the 'sui heredes,' i.e. the agnatic descendants of the deceased who are subject to his immediate power. They belong to the household of the deceased by virtue of the patria potestas—it is thus only a *pater*familias that can have sui heredes—and the relationship must be a direct one; that is to say, the sui heredes must be either children, or grandchildren by predeceased sons, so that, on the death of the father, they are his heirs—sui heredes, namely—by operation of the law (ab intestato). The estate of the father, or grandfather, vests in them by the direct force of the law, whether it devolve ex testamento or ab intestato. Not only is their consent unnecessary to constitute them heirs, but they even become heirs contrary to their wishes. They are heredes sui *et necessarii*. The old conception of family ownership still lives in the law regarding their succession. The effect of the ancestor's death is merely to vest absolutely a right which, on the old legal view, was already theirs during his lifetime. Hence an express act of entry on the part of sui heredes is not required: the delatio operates at the same time as an acquisitio of the inheritance. According to the civil law, they are not even allowed to disclaim the inheritance, because they cannot alter the fact that the property of their ancestor already belongs to them as members of his household. It was the

[1] We find the same antithesis between heredes domestici and heredes extranei in Greek law: v. Leist, *Gräco-italische Rechtsgeschichte*, p. 72 ff., 80 ff. In the same way, in German law, the 'Kinder in der Were' (i.e. the children belonging to the household) are the heredes domestici (sui heredes); cp. inf. § 97, n. 4.

§ 96. praetor who gave sui heredes the so-called 'beneficium abstinendi,' i. e. the right to disclaim the inheritance by declaring their intention not to take. At civil law, indeed, the suus remained heres in spite of such declaration, but the praetor refused to regard him as heres, and would not allow him to be sued by creditors with claims against the inheritance. If, however, he exercised his right of succession (immiscere se hereditati), he thereby forfeited the beneficium abstinendi. Thus, in praetorian law, the sui were given the same option as the heredes extranei, whether they would accept the inheritance—by intermeddling (immiscere)—or refuse it, by abstaining (abstinere). In this respect therefore the praetor had set aside the old notion of family ownership.

Sui heredes are, as we have already observed, those agnatic descendants of the deceased who were immediately subject to his power, in other words, those descendants who are freed from patria potestas by the death of the ancestor, or who would be thus freed, if they had been born in the ancestor's lifetime. Persons who were already sui at the time of the execution of the will are called sui simply; 'postumi sui' is the name given to persons who become sui after the execution of the will 'agnascendo,' either by birth or by the fact that the dropping out of their own father places them under the immediate power of the testator (their paternal grandfather), and thereby converts them into sui heredes of the testator. An uxor in manu is one of the sui heredes of her husband (sup. p. 370) in the same way as persons who become filiifamilias by adoptio (plena) or arrogatio (sup. pp. 386, 388). An emancipated child is not a suus heres. A mother cannot have sui heredes.

L. 11 D. de lib. et post. (28, 2) (Paulus): In suis heredibus evidentius apparet continuationem dominii eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur: unde etiam filiusfamilias appellatur sicut paterfamilias, sola nota hac adjecta, per quam distinguitur genitor ab eo qui genitus sit. Itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur. Hac ex causa, licet non sint heredes instituti, domini sunt,

nec obstat, quod licet eos exheredare, quos et occidere licebat. § 96.

(*b*) Grandchildren of the deceased paterfamilias by a son who survives him and who was in his father's power at the time of the latter's death, are not indeed sui heredes, but they are heredes domestici, because they were likewise—though only mediately—subject to the patria potestas of the deceased and accordingly belong to his household. Hence, like the sui, they are heredes necessarii of their grandfather. They do not succeed their grandfather ab intestato, because their father (the filiusfamilias of the deceased) excludes them. But if such a grandchild is instituted heir in the will of his grandfather, he is a heres necessarius, and through him, as heres necessarius, the inheritance of the grandfather is ipso jure acquired—by virtue of the patria potestas (p. 121)—for his (the grandchild's) father[2].

(*c*) In Roman law a testator may institute his own slave heir, manumitting him by the will at the same time. The slave then becomes free testamento (sup. p. 110), and acquires, at the same moment, the inheritance of his master by the necessary operation of the law (ipso jure). A slave thus instituted is included among the heredes domestici, because he belongs to his master and his master's household by virtue of the dominica potestas. This is the reason why he is a heres necessarius, but a heres necessarius who (as distinguished from heredes sui et necessarii) has no beneficium abstinendi. If the master's estate is insolvent, the slave is compelled to submit to bankruptcy proceedings and to bear all the consequences in his own person. He is however only liable to the

[2] L. 6 § 5 D. de adq. her. (29, 2): si nepos ex filio exheredato heres sit institutus, patrem suum sine aditione faciet heredem et quidem necessarium. It is clear therefore that *all* agnatic descendants are heredes necessarii, because they are all, by virtue of the patria potestas, heredes domestici, i. e. heirs belonging to the household of the deceased, and, in that sense, 'sui.' The term sui, in the narrower sense, as including only such domestici as were under the *immediate* power of the deceased, is intended for purposes of intestate succession, and indicates those who, owing to the absence of any nearer descendants between them and the intestate, are not only sui, but sui *heredes* (viz. on intestacy). No question arises as to grandchildren by a daughter, because they pass under the patria potestas of their father or *paternal* grandfather. As against their maternal grandfather they are not agnatic, but merely cognatic descendants.

§ 96. extent of the estate, and not in respect of other after-acquired property.

The institution of a servus alienus, on the other hand, operates as a delatio of the inheritance to the master of the slave instituted. The master may direct his slave to accept or otherwise, as he pleases.

2. *Heredes extranei.*

All heredes other than heredes domestici are heredes extranei. The delatio of an inheritance to a heres extraneus does not constitute him heir ipso jure. In order that the inheritance may vest, an act of entry (aditio hereditatis), in other words, the manifestation of an intention to take the inheritance, is necessary. Hence the description of such heirs as heredes 'voluntarii'[3]. The entry may be explicit or tacit. In the classical law, any act showing an actual intention to take the inheritance (pro herede gestio) is sufficient to constitute a valid aditio. A formal entry (cretio) is only necessary, in the classical law, if the testator expressly makes it a condition of the institution of the heir. In requiring a cretio, the testator, at the same time, prescribed the period (usually centum dies utiles) within which it was to be made. In such cases the heres institutus had to enter with certain formal words: Quod me Maevius heredem in-

[3] According to the old law the power to enter on an inheritance implied, not indeed a power to refuse it (p. 430), but a power to *assign* it. A heres legitimus (i. e. a person succeeding ab intestato by virtue of the provisions of the Twelve Tables) may, in so far as he is a heres voluntarius—i. e. if he is an agnatus proximus or a gentilis (inf. § 98)—assign the inheritance instead of accepting it himself, in other words, *ante* aditam hereditatem. Such an assignment can be accomplished, and another person made heir, by means of an in jure cessio, where the assignee raises a fictitious vindicatio hereditatis; Gajus ii. § 35: proinde fit heres is cui in jure cesserit, ac si ipse per legem ad hereditatem vocatus esset. The effect of the transaction was to transfer the heirship itself, and the in jure cessio thus supplied some compensation for that absence of a 'successio graduum' which was peculiar to the civil law of intestacy (p. 437). On the other hand, the effect of an in jure cessio hereditatis *post* aditam hereditatem—which was open to any voluntary heir, including therefore a testamentary heir—was merely to transfer the property comprised in the inheritance, and not to alter the devolution or the heirship. The assignee became owner of the things contained in the inheritance, but the assignor remained the heir, and consequently remained answerable for the debts. The obligatory rights (nomina) were destroyed, the assignee being unable to enforce them, because they did not admit of in jure cessio, and the assignor was likewise unable to sue, because, having lost the action concerning the inheritance (though only by a fiction), he was, on his own confession, not the heir, and consequently not entitled to sue as creditor on the nomina of the deceased.

stituit, eam hereditatem adeo cernoque. In the absence of an express limitation, there was no civil law rule, in the classical age, binding the heir to accept within a definite term. The creditors of the deceased however could require him, by means of an 'interrogatio in jure' (scil. 'an heres sit'), to make a declaration of his intention. The praetor might then, on the application of the institutus, allow him a so-called 'period of deliberation' within which to decide [4]. § 96.

The disclaimer of an inheritance of which delatio has been made is called 'repudiatio.' In the older law repudiatio was unknown (p. 430). In the classical law an inheritance is effectually repudiated by any act showing a clear intention not to take it. The repudiatio hereditatis, like the aditio, is irrevocable. If, however, a testator by his will required a cretio, a repudiatio was invalid, even in the classical law, i. e. the heir could carry out the cretio notwithstanding a prior repudiatio on his part, and the only way in which he could lose the inheritance was by failure to make the cretio within the prescribed period. Cretio having been abolished by an enactment of Arcadius and Theodosius, the rules on the subject cease to possess any practical importance in Justinian's law [5].

Ulp. tit. 22 § 25: Extraneus heres, siquidem cum cretione sit heres institutus, cernendo fit heres; si vero sine cretione, pro herede gerendo. § 26: Pro herede gerit, qui rebus hereditariis tamquam dominus utitur; velut qui auctionem rerum hereditariarum facit, aut servis hereditariis cibaria dat. § 27: Cretio est certorum dierum spatium, quod datur instituto heredi ad deliberandum, utrum expediat ei adire hereditatem, nec ne, velut: TITIUS HERES ESTO CERNITOQUE IN DIEBUS CENTUM PROXIMIS, QUIBUS SCIERIS POTERISQUE. NISI

[4] An 'interrogatio in jure' is an interrogatory which the magistrate (the praetor), in the exercise of his judicial discretion, permits to be administered in his presence (in jure), for the purpose of obtaining a binding declaration on the question as to whether, in the case of an intended defendant, the necessary conditions for making him a party to an action are forthcoming. Such interrogatories are e.g. 'an heres sit,' or 'quota ex parte heres sit,' or 'an in potestate habeat eum cujus nomine noxali judicio agitur.' The time applied for by the person interrogated within which to answer an interrogatio in jure is called 'tempus ad deliberandum.'

[5] As to the original nature of cretio v. inf. p. 428.

§ 96. ITA CREVERIS, EXHERES ESTO. § 28: Cernere est verba cretionis dicere ad hunc modum: QUOD ME MAEVIUS HEREDEM INSTITUIT, EAM HEREDITATEM ADEO CERNOQUE.

Eod. § 31: Cretio aut vulgaris dicitur, aut continua. Vulgaris, in qua adjiciuntur haec verba: QUIBUS SCIERIS POTERISQUE; continua, in qua non adjiciuntur. § 32: Ei qui vulgarem cretionem habet, dies illi tantum computantur, quibus scivit se heredem institutum esse, et potuit cernere. Ei vero qui continuam habet cretionem, etiam illi dies computantur quibus ignoravit se heredem institutum, aut scivit quidem, sed non potuit cernere.

GAJ. Inst. II § 168: Sicut autem qui cum cretione heres institutus est, nisi creverit hereditatem, non fit heres, ita non aliter excluditur quam si non creverit intra id tempus, quo cretio finita est; itaque licet ante diem cretionis constituerit hereditatem non adire, tamen paenitentia actus, superante die cretionis, cernendo heres esse potest. § 169: At is qui sine cretione heres institutus est, quive ab intestato per legem vocatur, sicut voluntate nuda heres fit, ita et contraria destinatione statim ab hereditate repellitur.

L. 17 C. de jure delib. (6, 30) (ARCAD., HONOR. ET THEOD.): Cretionum scrupulosam sollemnitatem hac lege penitus amputari decernimus.

III. *Hereditas jacens.*

Hereditas jacens is the term applied to an inheritance which has not yet vested, an inheritance, that is to say, which has been 'delata' to a heres extraneus (i. e. voluntarius), but has not yet been acquired by him. An hereditas jacens consists of rights and liabilities. It may even acquire new rights and incur new liabilities. It may acquire new rights, for instance, by the separation of fruits, by the juristic acts of slaves, by the completion of a usucapio. It may incur new liabilities, for instance, by reason of the negotiorum gestio of another, acting on behalf of the estate (sup. p. 318), or by reason of the delict of a slave belonging to the estate (sup. p. 331), and so forth.

As soon as the inheritance is entered upon and is thereby completely vested, the title of the heir dates back to the moment of the

death of the deceased. This rule contains the answer to a question which, at first sight, seems to present great difficulty, the question namely as to who is the subject of the rights and liabilities belonging to an hereditas jacens. The view which is most generally accepted makes the hereditas jacens its own subject. It is said to be a juristic person, and is compared, in this respect, to a foundation (sup. p. 101). Another theory represents the hereditas jacens as not having any subject at all. The rights and liabilities which constitute it are not, on this view, annexed to any person whatever. Neither of these theories seems satisfactory. According to the former, the heirship would devolve on the deceased's own estate, and this estate would therefore be the *person* succeeding in locum defuncti. The second view disregards the fact that it is the essence of every right or liability that it should be the right or liability *of somebody*, i. e. the terms 'to be entitled,' or 'to be liable,' can have no meaning, unless they are predicated of a subject to which the right or liability appertains. The answer which the positive law of Rome gave to the question is contained in the rule concerning the retroactive effect of the vesting of the inheritance. *The heir* is the subject of the hereditas jacens, and the rule referred to means, that the acceptance of the inheritance operates to constitute the heir retrospectively the subject of all the rights and liabilities of the deceased as from the moment of his death. The deceased is succeeded directly and without break by his heir, even though the latter may not acquire the heirship till long afterwards. He is never succeeded by his own inheritance. There is no uncertainty, prior to the vesting of the inheritance, as to the *existence* of a subject of the inheritance. The heir is the subject at once, and if no one wishes to take the inheritance, the fiscus will enter upon the bona vacantia 'loco heredis.' The only uncertainty is as to who the subject is. In other words, we have here an instance of a legal relationship in a state of suspension, i. e. the legal relationship exists, and the subject exists, but it happens to be objectively impossible, at the present moment, to specify who this subject is. Hereditas jacens is the very type and model of a suspended legal relationship. It will perhaps be argued, however, that this theory is clearly contradicted by the Corpus juris.

§ 96.

§ 96. For does not Ulpian say: hereditas *non heredis personam*, sed defuncti sustinet? And we venture to think that to this very passage is attributable the fact that, hitherto, writers on this question have shrunk from seeking a solution of the difficulty on the lines just indicated. We maintain, however, that Ulpian's statement coincides with the position we have been endeavouring to establish. In so far namely as the heir is heir, he is, so to speak, not himself, but the deceased. Consequently, the heir *quâ* subject of the inheritance, represents not himself, but the persona defuncti. And what is true of the heir is—prior to the vesting of the inheritance—predicated of the inheritance itself (the hereditas jacens), because the hereditas already contains potentially the heir, though he cannot, as yet, be named. The hereditas, like the heres, has the attribute of representing the deceased. The hereditas *is* the heir who, at some future date, will enter, and for this very reason it is *not* the heir (in his capacity, namely, of a *different* person), but the deceased, because the heir as heir is the deceased. Thus the passage just cited gives unequivocal expression to the idea which lies at the very root of the Roman law of inheritance, the idea, namely, that the heir, and consequently also the inheritance, prior to its vesting, represents the personality of the deceased regarded as the subject of proprietary legal relations. The hereditas contains implicitly the heir who has not yet entered. Hence we find Pomponius stating, in so many words, that the 'hereditas personam *heredis* interim sustinet.' So far from being mutually contradictory, the two statements that the hereditas represents the persona heredis and also the persona defuncti are rather mutually identical.

L. 24 D. de novat. (46, 2) (Pomponius): Morte promissoris non extinguitur stipulatio, sed transit ad heredem, cujus personam interim hereditas sustinet.

L. 34 D. de adq. rer. dom. (41, 1) (Ulpian.): Hereditas enim non heredis personam, sed defuncti sustinet.

L. 22 D. de usurp. (41, 3) (Javolen.): Heres et hereditas, tametsi duas appellationes recipiunt, unius personae tamen vice funguntur.

L. 54 D. de adq. her. (29, 2) (Florentin.): Heres quandoque

adeundo hereditatem jam tunc a morte successisse defuncto intellegitur. § 96.

L. 22 D. de fidej. (46, 1) (FLORENTIN.): Mortuo reo promittendi et ante aditam hereditatem fidejussor accipi potest, quia hereditas personae vice fungitur, sicut municipium et decuria et societas.

§ 97. *Hereditas and Bonorum Possessio.*

The law of inheritance, like other branches of the law, is dominated by the antithesis between the civil and praetorian law. The law of inheritance according to the jus civile is called 'hereditas,' the law of inheritance according to the jus honorarium is called 'bonorum possessio.' In the law of inheritance, as in other branches of the legal system, the praetorian law became, in the course of its development, the organ by which the jus gentium was enabled to enlarge the scope and rectify the application of the hard and fast rules of the civil law succession and, by so doing, to pave the way for yet another victory over the principles of the jus civile. § 97.

The origin of the praetorian bonorum possessio is veiled in obscurity.

According to one view, the development of bonorum possessio ought to be traced back to the old vindicatio by legis actio sacramento. Both parties claiming to be owners of the same thing, the magistrate, with a view to arriving at a provisional settlement, cancelled the status quo ante and regulated the possession anew (vindicias dare) in accordance with his judicial discretion (sup. p. 162). The party to whom the vindiciae were awarded, thereby obtained the 'rei possessio,' the 'possession of the thing,' pending the litigation. In cases where a hereditatis vindicatio was carried through in the form of a legis actio sacramento—and actions concerning inheritances continued, for a long time, to be taken in this form, because they fell within the jurisdiction of the centumviral court (sup. p. 171)—the necessary result of the 'vindicias dare' was that one party was awarded by the praetor *bonorum possessio*, i. e. the possession of the inheritance pending the litigation—presumably on

§ 97. the basis of a provisional enquiry into the respective rights of the parties in regard to the succession. The award of the bonorum possessio implied a provisional decision, by the praetor, of the question concerning the right of succession itself, and it may accordingly be assumed that, in many cases, the parties were content to drop all further proceedings, as soon as one of them had secured bonorum possessio from the praetor. This—it is suggested—is probably the manner in which the oldest form of bonorum possessio came into use, a bonorum possessio, namely, which was granted 'in aid of the civil law' (juris civilis adjuvandi gratia). When, in the further course of development, the praetor began to adopt a more independent attitude as against the civil law, he added to this the oldest form of bonorum possessio a second form, the purpose of which was to supply the defects of the civil law scheme of succession (bonorum possessio juris civilis supplendi gratia), and finally proceeded to an absolute assertion of his magisterial discretion by granting bonorum possessio, where he saw fit, in direct contradiction to the civil law (bonorum possessio juris civilis corrigendi gratia).

According to another view the germ of bonorum possessio is to be found in the so-called 'usucapio pro herede.' Until the heir takes possession of the property comprised in the inheritance, such property is, according to the ancient civil law, liable to usucapio on the part of any third person who may get possession of it. Usucapio pro herede required neither bona fides nor justus titulus. It was completed within a year in regard to any property—including land—comprised in an inheritance, because, in so far as a thing was the object of usucapio, it was not regarded in its separate character, but as a portion of the inheritance. In other words, the thing acquired by usucapio was a thing belonging to the inheritance, i. e. a third species of things, differing in kind both from movable and immovable things, and consequently the requisite period of usucapio was not that applying to res soli, viz. two years, but that applying to ceterae res, viz. one year. Of course the usucapio pro herede had a practical importance of its own in cases where—as might easily happen under the early civil law (inf. p. 431)—the inheritance was left without an heir. In such cases it was the nearest relations

of the deceased who would probably acquire his property by usucapio pro herede, and thus actually constitute themselves heirs. This method of acquiring an inheritance was a method conceived on the old lines of a singular succession under which the heir succeeded to the *separate portions* of the inheritance. And it was with a view to regulating so arbitrary a method of acquisition that the praetor—according to this theory—introduced the bonorum possessio, his aim being to exclude from the usucapio pro herede all those who had not been admitted by him (the praetor) to the possession of the estate (bonorum possessio). This second theory is even more hypothetical than the first, and harmonizes even less than the first with the whole history of the development of the Roman law of inheritance. Its gravest blemish is that it affords no explanation of what is most assuredly the oldest form of bonorum possessio, viz. the bonorum possessio juris civilis adjuvandi gratia. § 97.

Perhaps a third view is the true one[1].

In the early Attic law of inheritance we find a rule that the legitimate son of the deceased alone (the suus heres of Attic law) shall acquire the inheritance ipso jure, and shall accordingly be entitled, without more, to do any act for the purpose of maintaining his possession, including the right, if necessary, to oust an intruder from the possession of his father's inheritance by a mere private act

[1] The following exposition is based, in the main, on the admirable researches of Leist, in Glück's *Commentar zu den Pandekten, Serie der Bücher*, 37, 38, vol. i. (see also under the title Leist, *Der römische Erbrechtsbesitz in seiner ursprünglichen Gestalt*, 1870). And on the same subject see Leist, *Gräco-italische Rechtsgeschichte* (1884), p. 81 ff., 87 ff., where the author also refers to the analogies of Greek law (of which a somewhat one-sided use was made in the first edition of this book). According to Leist, bonorum possessio was originally 'a system by which the magistrate regulated the possession of the inheritance, having regard to the classes of persons entitled to succeed under the civil law,' and it was employed, at the same time—though only within a limited degree—for the purpose of enabling these classes to come in *successively*, 'ne bona hereditaria vacua sine domino diutius jacerent' (l. 1 pr. D. de successorio edicto 38, 9).—In Cicero's time the edict on the bonorum possessio ran (according to Leist, vol. i. p. 76) somewhat as follows: SI DE HEREDITATE AMBIGITUR ET TABULAE TESTAMENTI OBSIGNATAE NON MINUS MULTIS SIGNIS QUAM E LEGE OPORTET AD ME PROFERENTUR, SECUNDUM TABULAS TESTAMENTI POTISSIMUM POSSESSIONEM DABO.—SI TABULAE TESTAMENTI NON PROFERENTUR, TUM UTI QUEMQUE POTISSIMUM HEREDEM ESSE OPORTERET, SI IS INTESTATUS MORTUUS ESSET, ITA SECUNDUM EUM POSSESSIONEM DABO.—CUM HEREDITATIS SINE TESTAMENTO AUT SINE LEGE PETETUR POSSESSIO, SI QUA MIHI JUSTA (or, AEQUITATIS) CAUSA VIDEBITUR ESSE, POSSESSIONEM DABO.

§ 97. of his own (exagoge, deductio). The suus heres has an indisputable right of succession, and he is ipso jure, not merely heir, but *in possession* of the inheritance. It is different with the other heirs. In order to obtain possession of the inheritance, they must first apply to the archon for an order of judicial admittance[2].

There are many circumstances which point to the conclusion that similar principles prevailed in the earliest phase of the Roman law of inheritance. The Twelve Tables contained the following well-known rule:

Si intestato moritur, cui suus heres nec escit, adgnatus proximus *familiam habeto*. Si adgnatus nec escit, gentiles *familiam habento*.

Here we find the name 'heres' only applied to the suus heres, i. e. the agnatic descendant, the representative—in the strictest sense of the term—of the family of the deceased, the one in whom the personality of the deceased is both legally and physically perpetuated[3]. The suus heres was owner—though only in theory—of his ancestor's property even prior to the death of his ancestor, and, on such death, he merely continues his ownership (sup. p. 415). Accordingly the Twelve Tables do not *make* the suus heres heir. What they do is simply to acknowledge and assume his hereditas. The antithesis in the Twelve Tables lies between the genuine heres, on the one hand, and the proximus agnatus and gentiles on the other. All the Twelve Tables say of the latter is: familiam habento, i. e. they shall have the dead man's *property*. But they shall only have it after doing some act by which they acquire it. The statute avoids directly appointing the proximus agnatus or the gens to be heirs; they are not to be heirs ipso jure, by the immediate operation of the law, but only on the ground of an act of entry. As in the old Attic law, so in the old Roman law, a suus heres becomes ipso jure, not only heir, but also possessor of the inheritance[4], and it is this

[2] See a most instructive treatise by F. Schulin, *Das griechische Testament verglichen mit dem römischen* (being the Rectorial programme, Bâle, 1882), pp. 13, 21; Leist, *Gräco-ital. RG.*, loc. cit.

[3] Cp. E. Hölder, *Beiträge z. Gesch. d. röm. Erbrechts* (1881), pp. 21, 120.

[4] Hence in his case no act of entry (cretio) is required. And the same fact also explains why the existence of a suus heres ipso jure excludes the usucapio pro herede, for a usucapio pro herede can only operate on things left at a person's death which are in the possession of no one; Gajus ii. § 58, iii. § 201. Under the early law, therefore, where there was a suus heres, the inheritance *had* a possessor ipso jure.

very fact which marks him as the true heir. The proximus agnatus and the gens, on the other hand, are neither heirs nor possessors of the inheritance ipso jure. The suus heres is heir without any act of taking possession; the proximus agnatus and the gens only become heirs by virtue of an act of taking possession. This rule merely states in a different form what is expressed by another rule already adverted to (p. 418), the rule namely that, originally, a heres extraneus (voluntarius), i. e. an agnate or the gens or any third testamentary heir, could only acquire the right of succession and the inheritance by means of a cretio. There can be no doubt that, in the early law, an informal entry upon the inheritance was inoperative[5]; that consequently, at one time, cretio was necessary even in the case of heirs ab intestato and testamentary heirs instituted 'sine cretione'[6]; and that the force of instituting a testamentary heir 'cum cretione' was not, at the outset, to make his right to succeed conditional on the cretio—for that was a matter of course—but rather to make it conditional on his carrying out the cretio *within a fixed time*[7]. The cretio was, in the early days, the sole form in which a heres voluntarius could enter. It had to be made in solemn terms ('adeo cernoque,' v. p. 419), before witnesses and in the domicile of the deceased[8], and constituted the formal

§ 97.

In the old German law we find the same antithesis as in the old Attic and Roman law. There the 'Kind in der Were' (the suus heres of German law), i. e. the child who had remained at home, was ipso jure in possession, whereas all other heirs were required to take possession by a formal act ('Anfertigung' = cretio). This rule led in German law, like its counterpart in Roman law, to a system of admittance to the possession of inheritances by judicial award (bonorum possessio). Cp. Behrend, *Anevang und Erbengewere* (1885), p. 39.

[5] Cp. Voigt, *Jus naturale*, vol. iii. n. 223; Voigt, *Die zwölf Tafeln*, vol. ii. p. 372.—Even the classical Roman jurists treat cretio as the only form of aditio hereditatis; all other acts, including an express, but informal declaration of an intention to accept, merely constitute a pro herede gestio. Cp. e. g. Gajus ii. § 167; Ulpian tit. 22, § 25 (sup. p. 419).

[6] Compare also Gajus ii. § 189, where it is stated that a servus alienus who was instituted heir in a will could acquire the inheritance for his master by informal aditio, if he continued to belong to the same master; but if he was alienated to another master, he could only do so by cretio (jussu novi domini).

[7] Hence even Ulpian (tit. 22, § 27, sup. p. 419) defines the cretio clause in a will as 'certum *dierum spatium*.' If a testator merely prescribed a cretio, without fixing any time within which to make it, such a direction would not, according to the old law, operate to impose any condition (in the technical sense) at all, but would simply amount to a restatement of an existing legal requirement (a so-called 'condicio juris').

[8] Voigt, *Die zwölf Tafeln*, vol. ii. p. 372, n. 12. In the same way in German

§ 97. 'aditio hereditatis,' that is, as the word itself indicates, the formal entry upon the land (the farm) left by the deceased. Cretio was the solemn act by which a heres voluntarius took possession of the hereditas (adeo), coupled with a solemn assertion of his right to the succession (cerno)[9].

Thus in early Roman as in early Attic law a heres extraneus (i. e. any heres other than a heres domesticus) can only acquire the hereditas through the medium of an act of possession. In Attic law such possession is obtained by an order of the court; in Roman law by an act which, though extra-judicial, is nevertheless formal in character and is performed in the presence of witnesses. In Attic law the inheritance is acquired by a judicial admittance to possession; in Roman law, by means of the cretio. Causes were, however, at work in the Roman system which were bound, sooner or later, to assimilate Roman law in this respect to Attic law, and to introduce a practice under which bonorum possessio could only be obtained by the assistance of the magistrate.

The fact that, according to early Roman law, the suus heres was ipso jure in possession of his father's, or grandfather's, inheritance, rests on the assumption that, in the old Roman as well as in the old Attic law, the title of the suus heres to the succession is beyond dispute, i. e. that both in the old Roman and the old Attic law, the mere existence of sui heredes has the effect of absolutely excluding testamentary succession (cp. inf., p. 460). If there is a suus heres, there can be no doubt that he is heir. Accordingly the inheritance is his, i. e. he is in possession, ipso jure without more. On the

law the act had to be performed in the 'Sterbehaus.' Behrend, *loc. cit.* (sup. n. 4).

[9] Cerno (which is connected with the Greek κρίνειν) might, in its literal sense, be approximately rendered by 'I judge' (decerno, constituo), scil. that the inheritance belongs to me, or, better, I *adjudge* the inheritance to myself, i. e. I award it to myself by means of my judgment. It is another example of that formal and categorical mode of asserting a right which we find so frequently expressed by the word 'ajo' (e. g. hanc rem meam esse ex jure Quiritium). The 'adeo' is uttered first, because it forms the foundation of the following 'cerno,' and 'cerno' is not a mere idle repetition of 'adeo,' but a consequence which flows from it.—The rule that a usucapio pro herede (by a third party) was interrupted by the completion of the cretio was probably, at the outset, regarded as one of the results implied in the vesting of possession which the cretio effected; cp. Gajus ii. § 55; Voigt, *Die zwölf Tafeln*, vol. ii. p. 378.

other hand, where there is no suus heres, the right of succession may be a matter of controversy and consequently open to doubt. We have, as it is phrased, a case where 'de hereditate ambigitur.' The heirs ab intestato (agnates, gentiles) may find their title challenged by a testamentary heir, or, conversely, the testamentary heir may find his title challenged by an heir ab intestato (e. g. on the ground that the will is invalid), and so forth. And this is the reason why, in Greek law, every heir other than a suus heres required an order of the court for acquiring possession of an inheritance, the order being granted with certain formalities which supplied an opportunity for enquiring into the title of the claimant. It was for the same reason that, in Rome, the system of bonorum possessio by praetorian decree was developed, in the first instance, for the purpose of meeting cases of this kind. The praetor declared in his edict: *si de hereditate ambigitur* (i. e. in cases where the right of succession is contested and doubtful, no suus heres being forthcoming), I shall award possession of the inheritance (possessionem dabo) to him who can produce to me a will sealed with the number of seals required by the law; failing such a person, I shall award it to the nearest heir ab intestato. The praetor promises the heres *extraneus* (i. e. the testamentary heir, and the agnates or gentiles as heirs ab intestato) his assistance in order to enable them to obtain possession of the inheritance[10]. According to the civil law the extranei only became heirs by cretio, i. e. by a solemn private act, not, as in Athens, by a judicial award of possession. But the moment they meet with opposition in their attempt to take possession a praetorian award becomes necessary. Without the praetor's assistance they are unable to secure the real bonorum *possessio*, the possession of the inheritance. The suus heres has no

§ 97.

[10] Accordingly the class 'unde legitimi' (inf. p. 439) did not originally include the suus heres, but only the proximus agnatus and the gens: cp. Schirmer, *Handbuch des röm. Erbrechts* (1863), § 5, n. 1, § 10, n 74, § 15, n. 14. This fact would seem to show beyond all doubt that bonorum possessio was, at the outset, only designed for the benefit of the heres extraneus, because the suus heres did not need it. When, at a subsequent period, bonorum possessio was extended to the suus heres—whose title as possessor was destroyed by the full development of testamentary power (§ 99), and the praetorian beneficium abstinendi—the words of the edict 'si de hereditate ambigitur' were dropped.

§ 97. occasion for the praetorian bonorum possessio; he *is* in possession and is accordingly justified, if necessary, in using force for his own protection. The heres extraneus, however, who is not yet in possession, but requires to be admitted, is obliged, in such cases, to apply for a judicial (praetorian) award. There are good grounds for believing that the rule here stated contains the germ of the whole institution of bonorum possessio, the rule, namely, that, as against a third party in possession, a heres extraneus is debarred from employing force and must have recourse to an application for a judicial grant of possession. Bonorum possessio, in its oldest form, is an act of assistance by means of which the magistrate enables the civil law heres extraneus to obtain possession of the inheritance; in other words, it is a bonorum possessio juris civilis *adjuvandi* gratia.

At an early stage of its development, however, the praetorian edict adopted another idea of fundamental importance.

Under the old civil law it was competent for a heres extraneus (i. e. voluntarius) to enter on an inheritance or to assign it (sup. p. 418), but he had no power to decline it. That this was the case with the civil heir ab intestato is beyond all doubt. The old civil law recognized neither a successio graduum nor a successio ordinum (§ 98). Even if the inheritance was declined by the proximus agnatus, it did not, at civil law, devolve on the remoter agnates or the gens; and a declaration by the proximus agnatus of his refusal to take the inheritance was, legally speaking, inoperative. The hereditas remained 'delata' to him notwithstanding such declaration. And what is undoubtedly true of the heir ab intestato, is extremely probable in regard to the testamentary heir. Even in the classical period an heir who was instituted sub cretione could only annul the delatio of the inheritance by neglecting to make the cretio within the time fixed by the testator, but not by a repudiatio[11], and in the old law, cretio was, as we have seen, the general form of entering on an inheritance. The legal efficacy both of an informal act of entry and a repudiatio—the latter of which is invariably informal and, for that reason alone, points to a later stage of the

[11] Gajus ii. § 168, sup. p. 420.

law—dates from a subsequent period[12]. An explanation of this circumstance may be found in the fact that the early law was incapable of conceiving of any form which should enable an heir, who was not heir till he obtained possession of the inheritance, to get rid of a possession which he had never acquired; in the fact, that is to say, that, in the eyes of the early lawyers, a counterpart to the cretio seemed inconceivable. If the right of succession cannot be acquired by a mere declaration of intention, it cannot be lost by a mere declaration of intention. The ancient law of inheritance is characterized by the same spirit of narrowness and formalism as other departments of the law, and the rule of 'contrarius actus' (p. 341) prevails. § 97.

We should bear in mind, moreover, that, in the early law, no limit was fixed within which the cretio had to be made. Thus, if there were a will, without an institution cum cretione (p. 427), and the instituted heir made default in the cretio, the result was not that the estate devolved on the heir ab intestato, but that it was left in a state of abeyance. And the same result ensued, if the proximus agnatus failed to make the cretio.

We have already pointed out that the serious practical defects of the early civil law of inheritance were to some extent rectified by the institution of usucapio pro herede. Such a usucapio was only applicable to inheritances of which possession had not yet been taken, and its purpose was, on the one hand, to supply a stimulus for the person nominated heir to avoid unduly delaying the cretio, and, on the other hand, to afford the relations, who were entitled to the succession on default, an opportunity of acquiring the inheritance. It stands to reason, however, that the operation of the corrective thus supplied must have been, in a large measure, a matter of mere chance.

It was under these circumstances that the praetor, assuming the rôle of a legislator, intervened to amend the law by means of bonorum possessio. He laid it down as a general principle that, if a person,

[12] In the old law a man may praetermittere, but he cannot—with legal effect—repudiare hereditatem, i.e. he may omit to accept the inheritance, but he cannot refuse to do so. Cp. Voigt, *Die zwölf Tafeln*, vol. ii. p. 373.

§ 97. being nominated heir in a will, failed to submit the will to him with a view to obtaining possession of the inheritance, he (the praetor) would grant bonorum possessio to such person as, but for the will, would have been entitled by law to succeed as the next heir ab intestato[13]. And in connection with this rule he prescribed certain definite terms—generally 100 days—within which bonorum possessio had to be applied for. A principle of far-reaching importance had thus received the sanction of the law, the principle namely that an inheritance could devolve on *successive classes* of heirs. Not that the praetor conferred any power to repudiate. What he did was to declare that, as soon as the time limited by him for the obtaining of bonorum possessio had elapsed, the right to claim bonorum possessio should pass on to another person, and a person, who, at civil law, was not entitled to the inheritance at all. The praetor had no power to make a man heir, but he could give him the possession of the inheritance (bonorum possessio). Thus the system by which the magistrate gave possession of the inheritance in cases where the right of succession was doubtful (si de hereditate ambigitur), became the instrument by means of which the development of the civil law of inheritance was carried on. It was not, in the first instance, the intention of the praetor that the heir to whom he gave possession should retain the inheritance in any event. For if the testamentary heir subsequently made the cretio, he thereby became heres and, as such, was in a position to maintain a successful hereditatis petitio even against an heir ab intestato to whom the praetor had given bonorum possessio. The purpose of the praetor was rather to exclude the capricious operation of usucapio pro herede in cases where, at civil law, the inheritance was left vacant, and to establish certain fixed principles for providing a *de facto* heir, who, once he had really obtained possession of the property comprised in the inheritance, should, after the lapse of a year, acquire a civil law title as heir by means of the usucapio pro herede. The object of the praetor's intervention was, in this instance, to supply the defects of the civil law, in other words, to employ the bonorum possessio juris

[13] See the words of the edict: SI TABULAE TESTAMENTI etc., sup. p. 425, n. 1.

civilis supplendi gratia, and to employ it, at first, in favour only of the civil heir ab intestato as against a testamentary heir who unduly delayed his acceptance. But as early as Cicero's time the edict on bonorum possessio contained a general clause by virtue of which the praetor reserved to himself the power, if he thought fit, to grant the bonorum possessio even sine testamento and *sine lege* in accordance with his unfettered discretion. The foundation for the whole subsequent development was thus laid. § 97.

Meanwhile the civil law was progressing. Informal acts of entry by heirs came to be recognized as valid. It became moreover permissible—at any rate for a testamentary heir instituted sine cretione—effectually to repudiate an inheritance. And when the right of a testator to disinherit a suus heres was definitely acknowledged (§ 100), the force of the rule which put a suus heres ipso jure in possession of the inheritance ceased to be appreciated. A further change was due to the obscuring of the notion that possession of a dead man's property was acquired by aditio (cretio) hereditatis. The institution of bonorum possessio, however, to which the agencies at work in the old civil law had given rise, not only held its ground, but outstripped the civil law by far in the onward course of its development. The praetorian edict evolved, independently of the civil law, a complete system of hereditary succession of its own, and even took upon itself, in certain cases, to maintain this system in opposition to the civil law by means of a bonorum possessio juris civilis *corrigendi* gratia. The praetorian edict derived its strength from the fact that, in this as in many other branches of the law, it constituted itself the channel through which the progressive ideas of the age which the civil law refused to countenance, the ideas, in other words, of the jus gentium—amongst which that of *cognatic* succession was one of the most important—found admission to the Roman system. The award of the possession of the inheritance, which was originally designed to aid the civil heir in obtaining possession of his ancestor's estate, developed into a system of hereditary succession which contained in it the principles of a complete reform of the civil law.

Thus, in the classical age, two kinds of hereditary succession were

§ 97. recognized: firstly, a person might have a right of succession under the civil law (hereditas); secondly, he might have a right of succession under the praetorian law (bonorum possessio).

The praetorian right of succession can never be acquired otherwise than by a judicial act, viz. a petition ('agnitio') to the praetor. The rules concerning pro herede gestio and repudiatio have no application to bonorum possessio. The only manner in which a bonorum possessio, which has devolved on a person by virtue of the praetorian edict, can be forfeited, is by the neglect of such person to make the 'agnitio' within the time limited for the purpose. Ascendants and descendants are allowed an annus utilis, all other persons a term of centum dies utiles (quibus scierit poteritque)[14]. Since the principles on which bonorum possessio would be granted in all ordinary cases were publicly announced in the edict (bonorum possessio edictalis), it became permissible, at a later time, in such cases, to make applications to the praetor for bonorum possessio, not merely at a formal sitting of the court (pro tribunali), but at any place whatever (de plano). The result accordingly was that, as far as the bonorum possessio edictalis was concerned, the proceedings became, in point of fact, extra-judicial, the only remaining requirement being that the application should be addressed to the praetor. On the other hand, wherever the praetor granted bonorum possessio by means of a special decree (bonorum possessio decretalis) in circumstances not provided for by the edict, in all such cases the forms of a judicial sitting were preserved.

The grant of bonorum possessio resulted in the issue of the 'interdictum quorum bonorum,' an interdictum 'adipiscendae possessionis,' by the aid of which the bonorum possessor was enabled to obtain possession of the corporeal property left by the deceased. Subsequently, he was given an hereditatis petitio possessoria, which had the same effect as the hereditatis petitio of the civil heir (inf.

[14] There seems to be a connection between the term of 100 days fixed by the praetor for acquiring an inheritance, and the centum dies within which a caelebs was allowed to marry and thereby qualify himself for taking an inheritance: Ulp. tit. 17 § 1, sup. p. 385.—In the same way testators frequently fixed a term for the cretio corresponding to the term prescribed by the praetor: Ulp. tit. 22 § 27, sup. p. 419.

§ 101). For the purpose of enforcing the separate rights belonging to the inheritance the bonorum possessor can proceed by an actio ficticia (ficto se herede); and conversely, the creditors of the deceased have an actio ficticia against the bonorum possessor. § 97.

The distinction between the three kinds of bonorum possessio, according as it was employed juris civilis adjuvandi or corrigendi or supplendi gratia, was of considerable practical importance. The bonorum possessio juris civilis supplendi gratia is merely a provisional award of the right of succession, an award which is only to hold good in case there is either no civil heir at all, or the civil heir fails to assert his title. If the civil heir subsequently sues for the inheritance, the bonorum possessor must give way to him, because his appointment was only to stand *in default* of a civil heir (juris civilis supplendi gratia). His bonorum possessio is, in such cases, described as being a bonorum possessio 'sine re.' On the other hand, both the bonorum possessio juris civilis adjuvandi gratia and the bonorum possessio juris civilis corrigendi causa are invariably 'cum re,' the former, because it is in conformity with the civil law, the latter, because it is upheld by the praetor in opposition to the civil law. Thus the supplemental bonorum possessio only constitutes a provisional, while the other two forms of bonorum possessio constitute a definitive grant of the praetorian right of succession. We shall explain hereafter on, in more detail, under what point of view the several cases of bonorum possessio respectively fall.

The delatio of the bonorum possessio takes place on the same grounds as that of the hereditas. There is a bonorum possessio ab intestato, based on the provisions of the praetorian edict as such, a bonorum possessio secundum tabulas, based on the provisions of a will, and a bonorum possessio contra tabulas, taking effect in opposition to the will. At every point, within the domain of the law of inheritance, we find the praetor, with his edict, confronting the civil law as a rival power which seeks to satisfy the changing legal convictions of the nation and to bring the civil law of ancient tradition, in its practical application, into harmony with the requirements of successive generations.

§ 97. pr. I. de bon. poss. (3, 9): Jus bonorum possessionis introductum est a praetore emendandi veteris juris gratia. Nec solum in intestatorum hereditatibus vetus jus eo modo praetor emendavit, . . . sed in eorum quoque qui testamento facto decesserint.

§ 1 eod.: Aliquando tamen neque emendandi, neque impugnandi veteris juris, sed magis confirmandi gratia pollicetur bonorum possessionem. Nam illis quoque qui recte facto testamento heredes instituti sunt, dat secundum tabulas bonorum possessionem. Item ab intestato suos heredes et adgnatos ad bonorum possessionem vocat; sed et, remota quoque bonorum possessione, ad eos hereditas pertinet jure civili.

§ 2 eod.: Quos autem praetor solus vocat ad hereditatem, heredes quidem ipso jure non fiunt. Nam praetor heredem facere non potest; per legem enim tantum vel similem juris constitutionem heredes fiunt, veluti per senatusconsultum et constitutiones principales. Sed, cum eis praetor dat bonorum possessionem, loco heredum constituuntur, et vocantur bonorum possessores.

L. 2 D. de bon. poss. (37, 1) (Ulpian.): In omnibus enim vice heredum bonorum possessores habentur.

Gaj. Inst. IV § 34: Habemus adhuc alterius generis fictiones in quibusdam formulis, veluti cum is qui ex edicto bonorum possessionem petit, ficto se herede agit; cum enim praetorio jure, non legitimo succedat in locum defuncti, non habet directas actiones, et neque id quod defuncti fuit, potest intendere SUUM ESSE, neque id quod ei debebatur, potest intendere DARI SIBI OPORTERE: itaque ficto re herede intendit, velut hoc modo: JUDEX ESTO. SI AULUS AGERIUS (id est ipse actor) LUCIO TITIO HERES ESSET, TUM SI EUM FUNDUM, DE QUO AGITUR, EX JURE QUIRITIUM EJUS ESSE OPORTERET; et si debeatur pecunia, praeposita simili fictione heredis ita subjicitur: TUM SI PARERET NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA DARE OPORTERE.

§ 98. *Intestate Succession.*

I. Intestate Succession under the Early Civil Law. § 98.

According to the early civil law, as formulated in the Twelve Tables, the following persons are entitled to succeed ab intestato:

(1) the sui heredes (sup. p. 415);

(2) the proximus agnatus, i. e. in default of sui heredes, the inheritance devolves on the nearest agnatic collateral[1];

(3) the gentiles, i. e. in default of agnatic collaterals, the inheritance devolves on the gentiles, or persons belonging to the same clan as the deceased (sup. p. 359). The fact of the gentiles being thus entitled to the succession testifies to the effect which the old conception of the common ownership of the gens continues to exercise[1a].

In the second class it is only the *proximus* agnatus, or several agnates within the same degree of proximity, upon whom the inheritance devolves. In the old civil law there is no refusal of inheritances (sup. p. 430), and consequently no 'successio graduum,' i. e. no series of successive delationes to the several degrees within the same class. The same rule holds good in regard to the different classes inter se. Just as there is no successio graduum, so there is no 'successio ordinum,' no series, that is to say, of successive delationes to the several classes of heirs. If there are agnates, the inheritance cannot devolve on the gentiles, and the fact that the agnates make no use of their delatio does not alter the rule. A refusal of the inheritance being unknown, the words of the Twelve Tables, taken strictly, only call the agnates to the succession *in default* of sui, and the gentiles *in default* of agnates. In a word, according to the old civil law, there can be but one single delatio of a right of intestate succession. If such delatio fails to take effect, the estate may perchance find an heir by usucapio pro herede (sup.

[1] As to the nature of agnatio v. sup. p. 356.—According to the interpretation which was put on the lex Voconia (169 B. C.)—an enactment restricting the rights of women to take under wills—the only female agnates who were, at a later time, held entitled to take in the second class of heirs ab intestato, were the consanguineae, or agnatic sisters of the deceased.

[1a] Cp. Mommsen, *Röm. Staatsrecht*, vol. iii. p. 26.

§ 98. p. 424), or a praetorian heir may take it by virtue of a praetorian bonorum possessio. If no one even applies for bonorum possessio, the praetor gives the deceased's creditors possession of the unclaimed estate, in order that they may sell it to a bonorum emtor (sup. p. 211) for the purpose of satisfying their demands.

An emancipatus may have sui, but he cannot have agnates. The place of the agnates is taken, in his case, as in the case of a manumitted slave, by his manumissor (sup. p. 393), and the agnatic descendants (the sui) of such manumissor.

XII tab. V 4. 5: Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto. Si adgnatus nec escit, gentiles familiam habento.

Gaj. Inst. III § 11: Non tamen omnibus simul agnatis dat lex XII tabularum hereditatem, sed his qui tum, cum certum est aliquem intestatum decessisse, proximo gradu sunt. § 12: Nec in eo jure successio est: ideoque si agnatus proximus hereditatem omiserit, vel antequam adierit, decesserit, sequentibus nihil juris ex lege conpetit.

II. Intestate Succession according to the Praetorian Edict.

The praetorian edict divides the relations of a deceased person for purposes of intestate succession into four classes, upon whom the succession devolves in order of priority. There is a bonorum possessio unde liberi, unde legitimi, unde cognati, and unde vir et uxor.

1. Bonorum possessio unde liberi.

The 'liberi' of the praetorian edict include the sui heredes of the civil law and also the emancipati, but only such emancipati as are descendants of the body of the deceased. To this extent the praetor, in dealing with the first class of heirs ab intestato, discards the agnatic principle of the civil law in favour of the cognatic principle. He did not however adopt the cognatic principle in its entirety. For the praetorian class unde liberi includes—besides the sui—only the emancipated natural descendants of the deceased, not children who have been given in adoption—unless indeed the adoptive relationship has been extinguished by emancipation, in which case the child becomes one of the liberi of his natural

father in like manner as though the latter had emancipated him himself. So far as the bonorum possessio unde liberi benefits the sui, it is a bonorum possessio juris civilis adjuvandi gratia, so far as it benefits emancipated children, it is a bonorum possessio juris civilis corrigendi gratia. But the effect of this praetorian correction of the civil law in favour of emancipati may be that, in some cases, the emancipatus is called to the inheritance of his father together with his own children. This would happen, if the children of the emancipatus, begotten prior to the emancipatio, had remained in the power of their grandfather. In such a case the children of the emancipatus would belong to the sui of their grandfather, and the emancipatus himself would belong, together with his children, to the liberi of the praetorian law. Accordingly the praetorian edict (the so-called 'edictum de conjungendis cum emancipato liberis ejus')[2] provided that, in such an event, the share of the inheritance, which the emancipatus would have taken but for his emancipation, should belong, as to one moiety to him, as to the other to his children. In this manner the inequality was adjusted by which the other brothers and sisters would have suffered, if the emancipatus and his children had each been allowed to take a full share of the inheritance. A further inequality arose from the fact that sui, being incapable of acquiring property (sup. p. 121), were exclusively confined to their share of the patrimony, whereas the emancipatus was entitled, not only to his share of the patrimony, but also to any after-acquired property. The praetor remedied this injustice by requiring the emancipatus to make a 'collatio bonorum,' i. e. to bring into hotchpot all property acquired by him in the interval between his emancipation and the death of his father, so far as such property would, but for the emancipation, have passed to the father —property in the nature of peculium castrense and quasi castrense being thus exempted. § 98.

2. Bonorum possessio unde legitimi.

In default of liberi, or on the failure of the liberi to make 'agnitio'

[2] This edict was added by Salvius Julianus when he prepared his final consolidation of the edict under Hadrian (sup. p. 56). Hence it is also called 'nova clausula Juliani de conjungendis,' etc.

§ 98. within the prescribed annus utilis, the 'legitimi,' i. e. the civil law heirs ab intestato, are entitled to ask for bonorum possessio. The legitimi consist (in the classical law), in the first instance, of the sui again — exclusive however of the emancipati. The sui, as such, have accordingly another annus utilis within which to apply for bonorum possessio. In default of sui, the proximus agnatus comes in. Where there were neither sui nor agnates, the inheritance, in the older times, passed to the gentiles—so long, namely, as the mutual connection between gentiles continued to be felt. It is hardly necessary to point out that the bonorum possessio unde legitimi was a bonorum possessio juris civilis adjuvandi gratia.

3. Bonorum possessio unde cognati.

If the second class also fails to make agnitio, or if there is no one belonging to the second class, the praetor calls, in the third place, the cognates down to the sixth degree inclusive, and of the seventh degree a sobrino sobrinave natus. The children of consobrini (i. e. of children of brothers and sisters) are termed in their mutual relation sobrini. A sobrinus is related to the deceased in the sixth degree. By the praetorian law the child of a sobrinus (sobrino natus), who stands in the seventh degree, is entitled to succeed the intestate, although in the converse case the sobrino natus could not have been succeeded by the intestate. As between several cognates, the proximity of degree decides. Accordingly the praetor calls in the first place again the descendants of the deceased (for the third time), but in this case all the issue of the deceased are included, whether they are emancipated or given in adoption or not, and whether they still belong to the adoptive family or not. In the category unde cognati all rank equally, emancipatus and suus, capite minutus and filiusfamilias, and natural relationship alone decides. An uxor in manu, who belongs both to the liberi of the first class and the sui of the civil law, does not take concurrently with her children in the third class, nor do the children of an emancipatus who have remained in the patria potestas of the deceased (their grandfather) take concurrently with the emancipatus himself. For the rule is to call, in the first instance, all descendants, but no others, and to call them in such a manner that the

descendants of descendants are absolutely excluded by their parent, § 98.
if he is still living[3]. It is in this class that the mother, as such, at last becomes entitled to succeed (though she is postponed to the children), and her right is unaffected by the question whether she was in manu mariti or not. In the same way the children, as such, are entitled to the succession of their mother. Then follow the cognatic collaterals to the sixth (or seventh) degree, irrespectively of sex[4] and irrespectively of capitis deminutio.

4. Bonorum possessio unde vir et uxor.

In the last place, where there are no relations of any of the preceding classes entitled to the succession, or where such as are entitled do not avail themselves of the bonorum possessio, the succession is granted to the surviving husband or wife, as such, irrespectively of manus.

Both the bonorum possessio unde cognati and the bonorum possessio unde vir et uxor are only employed juris civilis supplendi gratia; that is to say, if there are civil heirs who have merely failed to apply for bonorum possessio, both these forms of bonorum possessio are only of a provisional nature.

We have already observed that the praetorian law recognizes the principle of a successio ordinum. Accordingly, if no member of the class first entitled avails himself of the bonorum possessio within the prescribed interval, the class next in order can apply. And, in the same way, within the limits of the third class, a successio graduum takes place, i.e. if the nearest cognates, who are called first, fail to apply, the more remote cognates can claim the bonorum possessio. For it is a principle of the praetorian law—and it is in furtherance of this principle that the successio graduum et ordinum (the so-called 'edictum successorium') is employed—that no inheritance ought, if possible, to be left without an heir.

III. Intestate Succession in the Law of Justinian.

The claims of cognatio to confer rights of intestate succession concurrently with agnatio had already been acknowledged, to some

[3] In this class, therefore, the clausula Juliani de conjungendis cum emancipato liberis ejus has no application, since the children who have remained in the power of their grandfather are excluded by their father, the emancipatus.

[4] Sup. n. 1.

§ 98. extent, by the praetor in his edict. The history of the imperial legislation on the subject of intestate succession is the history of a slowly progressive development in which the cognatic principle asserts itself with ever increasing insistence. Thus the senatusconsultum Tertullianum (under Hadrian) bestowed upon a mother, as such, who, being an ingenua, had the jus trium liberorum, or, being a libertina, the jus quatuor liberorum[5], a civil law right to succeed her intestate children ('legitima hereditas'), the mother taking concurrently with an agnatic sister, though excluded by an agnatic brother of the deceased. She was postponed, by the same enactment, to the liberi and the father, or parens manumissor, of the deceased, but was preferred to the more remote agnates. And conversely, the senatusconsultum Orphitianum (under Marcus Aurelius, 178 A.D.) conferred on children, as such, the first right of succession to their intestate mother. Valentinian II and Theodosius subsequently gave children a further right of intestate succession as against their maternal ascendants in preference to the more remote agnates. Thus, through the medium of these two senatusconsulta, the reciprocal relation of mother and children, as such—which the old civil law completely ignored (sup. p. 356)—had gained the recognition of the civil law as far as intestate succession was concerned. In other words, the law of succession *as between ascendants and descendants* had undergone a reform in the direction of an acknowledgment of the cognatic principle. The Emperor Anastasius paved the way for a reform, on the same lines, of the law of succession as between brothers and sisters, by enacting in the year 498 A.D., that emancipated (i. e. merely cognatic) brothers and sisters should take concurrently with agnatic brothers and sisters, with this restriction, however, that the former should only be allowed to claim one half of the share belonging to an agnatic brother or sister. Justinian placed cognatic brothers and sisters and their children on the same footing as agnatic brothers and sisters and—by the 84th Novel—gave brothers and sisters of the whole blood, as such, a preference over agnatic brothers and sisters of the half blood.

Even in the Corpus juris, however, we find the two systems of

[5] Sup. p. 385.

intestate succession—the civil law system of agnatic intestate succession as modified by the legislation of the empire on the one hand, and the praetorian system of bonorum possessio ab intestato on the other—standing side by side in much the same manner as in the older law. The final reform of the law of intestate succession was not accomplished by the Corpus juris, but was reserved for the 118th Novel, with its supplement, the 127th Novel. § 98.

The 118th Novel repeals the pre-existing systems of intestate succession as between relatives and lays down a uniform system of its own. The antithesis between jus civile and jus honorarium is swept away, but the victory remains with the cognatic principle, of which the jus honorarium was in the first instance the organ. According to the 118th Novel the principle upon which the right of succession as between relatives depends, is the proximity of natural blood-relationship, in other words the proximity of cognatio. For purposes of intestate succession the 118th Novel divides relations into four classes:

1. The first class consists of the deceased's descendants as such, whether the ancestor be father or mother. As between them, the rules of cognatic succession apply[6]. Adoptive children, however, rank equally with natural children (sup. p. 388), so that an adoptive child has a right to succeed both his natural father—whose real cognatic descendant he is—and his adoptive father[7]. Descendants of the first degree take in equal shares (successio in capita). Descendants of descendants are excluded by their parent, if he survives; but if he has predeceased the intestate, they have a so-called 'right of representation,' i.e. they step into his place and take collectively the share which the parent would have taken, if he had lived (successio in stirpes).

2. The second class consists of the ascendants, the brothers and sisters of the whole blood, and the children of predeceased brothers and sisters of the whole blood. The members of this class are

[6] We have already explained these rules (sup. p. 440) in dealing with the praetorian class unde cognati. Cp. p. 357.

[7] The recognition of the rights of an adopted child as against his adoptive family contains the last vestige of the old agnatic principle. The foundation of the rule is the idea that agnatio carries with it, by implication, all the rights of cognatio, cp. p. 357.

§ 98. determined solely by reference to their cognatio, agnatio being disregarded altogether. Among ascendants it is only the nearest who take; there is no rule entitling the surviving ascendant of a predeceased parent to step into the place of the latter. Accordingly the grandparents on either side only succeed to the inheritance, if both the parents of the intestate have predeceased them. In such a case—and when there are no brothers and sisters, or children of brothers and sisters, to share the estate—a division 'in lineas' is made between the grandparents [8], i. e. one moiety of the estate goes to the paternal ascendants, the other to the maternal ascendants. Thus, on the one hand, if the paternal grandfather is the sole survivor, he will take one moiety of the inheritance; if, on the other hand, both the maternal grandparents survive, they will only take the other moiety between them.

If however the survivors include, besides ascendants, brothers and sisters of the whole blood, and also children of predeceased brothers and sisters of the whole blood, such brothers and sisters, or their children (as the case may be) [9], come in concurrently with the ascendants. In such cases the ascendants and the brothers and sisters take in capita—no distinction being made between the paternal and maternal line of ascendants—each of them being entitled to an equal share. Children of predeceased brothers and sisters of the whole blood step into the place of their predeceased parent by a right of representation, and take collectively the share which their parent would have taken, if he had lived (successio in stirpes).

3. The third class consists of brothers and sisters of the half blood and children of predeceased brothers and sisters of the half blood, no distinction being made between consanguinei and uterini (sup. p. 358), i. e. their right of succession is based on the fact of their being *cognatic* half-brothers and half-sisters. Brothers and sisters of the half blood take in equal shares (successio in capita). If any of them predecease the intestate, the children step into the

[8] Or, if all the grandparents have also predeceased the intestate, the division is made between the still more remote ascendants, if any such survive.

[9] According to the 118th Novel the latter (i. e. the children) only come in with the brothers and sisters, though not with the ascendants, but by the 127th Novel they were allowed to take concurrently with ascendants as well.

place of their parent by a right of representation, and take collectively the share which their parent would have taken, if he had lived (successio in stirpes). § 98.

4. The fourth class consists of all the remaining collaterals who take according to proximity of degree. The praetorian restriction by which collaterals could only succeed to the sixth or, in one case (sup. p. 440), to the seventh degree, was abrogated. So far as collateral kinship can be proved at all, it may be alleged in support of a claim, unless indeed nearer relations intervene. As between these collaterals however there is neither a right of representation—the nearer degree absolutely shutting out the more remote one—nor is there a successio in stirpes, because several collaterals of the same degree invariably take in equal shares (in capita).

As between the several classes, the successio ordinum applies: that is to say, if no one belonging to the first class becomes heir—whether by death (prior to aditio) or by refusal—the estate devolves on the class next entitled. As between the several degrees within each class, the successio graduum applies: that is to say, if no one of the degree first entitled becomes heir, the estate devolves on the persons of the next degree.

The reforms effected by the 118th and 127th Novels only touched the succession of relations. The rules of the praetorian bonorum possessio unde vir et uxor continued to regulate the mutual succession of husband and wife, so that, in Justinian's law, the right of a husband or wife to succeed to his or her spouse remains postponed to that of all his or her relations. They are excluded by even the most remote collateral. Only a widow who was very poor and had no dos, was entitled, in Justinian's law, to certain claims against the estate of her husband, if the latter died in well-to-do circumstances. If there are less than three children, she takes one fourth part of the estate, if there are three or more children, she only takes a 'portio virilis,' i. e. an equal share with her children. So far however as, in so doing, she curtails the shares of her own children, she only acquires a usufruct, not ownership, in her share. The right thus granted to a poor widow is one of which she cannot be deprived even by the will of her husband.

§ 98. The bonorum possessio unde vir et uxor is, at the same time, the last remnant of the former praetorian law of intestate succession which survives the law of the 118th Novel. For the rest—as far as intestate succession is concerned—the dual system of hereditas and bonorum possessio has ceased to exist. It was removed by means of a development which proceeded from within, a development which culminated in the victory of that natural system of succession of which the praetor had always been the mouthpiece.

On the death of a filiusfamilias who, at the time of his death, was in the power of his father, the law prior to the 118th Novel made his entire property (including his peculium castrense and quasi castrense) revert to his father jure peculii, just as though it had been the father's property all along (sup. p. 392). The 118th Novel however provided that the estate of a filiusfamilias should devolve, on his death, in just the same manner as that of a paterfamilias. Accordingly it goes in the first instance to the filiusfamilias' own children. The only difference is that the property which the children of the filiusfamilias take from their father is reckoned as bona adventicia, so that the grandfather, whose patria potestas extends to his grandchildren, has a usufruct in it and also the right to manage it (sup. p. 392). In this matter too the 118th Novel embodies the final completion of a development extending over a period of several centuries. The ultimate victory of the principle of cognatic intestate succession coincides with the acquisition by the filiusfamilias of the capacity of having heirs, and, with it, of complete proprietary capacity. In the former as well as in the latter respect, it was the civil law incidents of patria potestas that had yielded to the ideas and sentiments of a different age.

Nov. 118 pr.: Quia igitur omnis generis ab intestato successio tribus cognoscitur gradibus, hoc est ascendentium et descendentium et ex latere, quae in agnatos cognatosque dividitur, primam esse disponimus descendentium.

c. 1: Si quis igitur descendentium fuerit ei qui intestatus moritur, cujuslibet naturae aut gradus, sive ex masculorum genere, sive ex feminarum descendens, et sive suae potestatis, sive

sub potestate sit, omnibus ascendentibus et ex latere cognatis praeponatur.— § 98,

c. 2: Si igitur defunctus descendentes quidem non relinquat heredes, pater autem, aut mater, aut alii parentes ei supersint, omnibus ex latere cognatis hos praeponi sancimus, exceptis solis fratribus ex utroque parente conjunctis defuncto . . . Si autem plurimi ascendentium vivunt, hos praeponi jubemus qui proximi gradu reperiuntur, masculos et feminas, sive paterni, sive materni sint.—

c. 3 pr.: Si igitur defunctus neque descendentes, neque ascendentes reliquerit, primos ad hereditatem vocamus fratres et sorores ex eodem patre et ex eadem matre natos, quos etiam cum patribus ad hereditatem vocavimus. His autem non existentibus, in secundo ordine illos fratres ad hereditatem vocamus qui ex uno parente conjuncti sunt defuncto, sive per patrem solum, sive per matrem. Si autem defuncto fratres fuerint et alterius fratris aut sororis praemortuorum filii, vocabuntur ad hereditatem isti cum de patre et matre thiis masculis et feminis, et quanticunque fuerint, tantam ex hereditate percipient portionem, quantam eorum parens futurus esset accipere, si superstes esset.—

c. 3 § 1: Si vero neque fratres, neque filios fratrum, sicut diximus, defunctus reliquerit, omnes deinceps a latere cognatos ad hereditatem vocamus, secundum uniuscujusque gradus praerogativam, ut viciniores gradu ipsi reliquis praeponantur.

c. 4: Nullam vero volumus esse differentiam in quacunque successione aut hereditate inter eos qui ad hereditatem vocantur, masculos ac feminas, quos ad hereditatem communiter definivimus vocari, sive per masculi, sive per feminae personam defuncto jungebantur; sed in omnibus successionibus agnatorum cognatorumque differentiam vacare praecipimus.

L. un. C. unde vir et uxor (6, 18) (Theodos.): Maritus et uxor ab intestato invicem sibi in solidum pro antiquo jure succedant, quotiens deficit omnis parentum, liberorum, seu propinquorum legitima vel naturalis successio, fisco excluso.

§ 99. *Testamentary Succession.*

§ 99. A testament, in the form which it ultimately assumed in the development of Roman law, is a unilateral juristic act, to take effect at death, whereby a person institutes an heir. It is unilateral (sup. p. 132), because it is effectuated by the will of the testator alone, a declaration of acceptance on the part of the instituted heir being neither necessary nor material. It does not take effect till death, because it is revocable, as long as the testator lives. A second will necessarily operates to revoke the first; no one's estate can devolve by virtue of two wills. As between several wills the last one alone has legal validity. The necessary result of the last-made will is to offer the instituted heirs the *entire* inheritance, for: nemo pro parte testatus, pro parte intestatus decedere potest (sup. p. 414). The only persons who, in Roman law, are privileged to make a testamentary disposition of part of their inheritance are soldiers[1]. As regards the contents of the will, the essential part is the institution of the heir. If no heir is instituted, or if the institution fails by reason of the death or disclaimer of the heir or on any other ground, the whole will is void. No will can be valid, where there is no valid institution of an heir. But in addition to the institution of the heir, a will *may* contain other dispositions designed to take effect on the death of the testator, such as manumissions (sup. p. 110), legacies, appointments of guardians; and the validity of all such dispositions depends on the validity of the institution of the heir.

The capacity to execute a Roman testament is called 'testamenti factio activa.' No one but a civis Romanus paterfamilias with complete capacity of action has testamenti factio activa. A filius-familias can only dispose by will of his bona castrensia and quasi castrensia, in regard to which he stands in the same position as a paterfamilias. Impuberes, furiosi, and prodigi are not competent to make a will, because they lack capacity of action. A pubes minor,

[1] Thus the rule is expressed more fully as follows: Nemo *ex paganis* pro parte testatus etc. Paganus means a civilian as opposed to a miles.

on the other hand, is competent, because he is fully qualified to act (sup. p. 142). As long as the tutela mulierum was in force, women, who were sui juris, could only make a will with the auctoritas of their guardian; but the abolition of the tutela mulierum removed this restriction. § 99.

'Testamenti factio passiva,' on the other hand, is the capacity to be instituted heir, or to be appointed legatee in a will. Testamenti factio passiva is thus part of the proprietary capacity of the jus civile (jus commercii), or, in Justinian's law, where the antithesis of jus civile and jus gentium has disappeared, of proprietary capacity in general; in other words, in Justinian's time, it is a necessary incident of a man's personality as such (sup. p. 101). The only requisite is that the person instituted heir must have been in existence at the death of the testator, at any rate as a nasciturus (sup. p. 101). In Justinian's law, the juristic persons of the public law, such as the state, the church, or communities, have testamenti factio passiva, but other juristic persons can only acquire it by special grant of the emperor. The incapacity to take as heirs or legatees which was imposed on certain classes of persons by positive enactments of a penal nature, carried with it a forfeiture of the testamenti factio passiva (inf. p. 472).

The successive stages through which Roman wills passed in the course of their historical development will appear from the following.

I. Wills in the Early Civil Law.

The only kind of will originally known to the early civil law was the 'testamentum calatis comitiis'[1a], i. e. a will made in the popular assembly. The reason for this is probably to be found in the fact that the institution of an heir was, at the outset, a modified form of adoption[2], an adoption, namely, the effect of which was to make the heres institutus the son of the testator, not indeed immediately, but as from the testator's death—provided, of course, the will was not revoked, and the heir complied with the testator's intentions. As in

[1a] As to the nature of the comitia calata v. Mommsen, *Röm. Staatsrecht*, vol. iii. p. 39.

[2] See Schulin's treatise referred to above p. 426, n. 2 (especially p. 50 ff.), where the author supports the above view of the origin of wills by arguments which to me seem conclusive. For a different view v. Pernice, *Formelle Gesetze im röm. Recht*, p. 29.

§ 99. the case of adoptions[3], so in the case of wills, the co-operation of the popular assembly was required. The only exception to this rule was in favour of soldiers standing in the line of battle, who were permitted to make a valid will informally by a mere verbal communication to their nearest comrade ('testamentum in procinctu').

In progress of time, however, a form of private testament came into use. This was the so-called 'mancipatory will,' or 'testamentum per aes et libram.' The testator, in the presence of five witnesses and a libripens, mancipates (i. e. sells) his estate (familia pecuniaque) to a third party, the so-called familiae emtor, with a view to imposing upon the latter, in solemn terms (nuncupatio), the duty of carrying out his last wishes as contained and expressed in the tabulae testamenti. The object of the transaction is to make the familiae emtor, not the material, but only the formal owner of the estate. His actual duties consist in the carrying out of the testator's intentions and the handing over of the property to the persons named in the tabulae testamenti. The familiae emtor is neither more nor less than the executor of the testator. And it is as such that he describes himself in the solemn words of the mancipatio with which he takes possession of the familia pecuniaque of the testator: familiam pecuniamque tuam *endo mandatela tua custodelaque mea* (esse ajo, et ea) quo tu jure testamentum facere possis secundum legem publicam, hoc aere aeneaque libra esto mihi emta[4]. We have here a case of a qualified mancipatio with a collateral agreement in favour of a third party, viz. the person or persons named in the will as beneficiaries. It is the earliest instance in Roman law of an agreement concluded in favour of a third party. Just as a mancipatio (scil. fiduciae causa, sup. p. 34) can be utilized for the purpose of effecting a commodatum or depositum, so it can be made available

[3] This is true originally not merely of arrogatio, but of every form of adoption, since the subsequent form of datio in adoptionem by means of a private act is unmistakably of later origin. It presupposes the rule of the Twelve Tables: si pater filium ter venumduit etc. Sup. p. 387.

[4] This is Mommsen's reading. The familiae emtor declares that in acquiring ownership in the familia by means of the mancipatio, he is merely acting on behalf of (i. e. as agent of) the testator (endo mandetela tua), and consequently that he is, substantially, in the position of trustee of another man's property (endo custodela mea).

for the purpose of effecting a mandatum. And this is what is actually done in the case before us. We have here the oldest form of the Roman contract of mandatum—a juristic act validly concluded, not indeed consensu, but re (viz. by a formal conveyance of ownership), and a juristic act giving rise to a rigorously binding obligation. The mandatum and the conveyance of ownership are not mutually incompatible. The familiae emtor is the mandatary of the testator, *because* he is, formally speaking, the owner of the familia. A mancipatory will is akin to a fiducia, because, in the former as well as in the latter, the ownership which is transferred is merely formal ownership, and, as such, is made the practical medium for effectuating the purposes specified in the collateral clause. A mancipatory will is not, however, a fiducia, in the technical sense of the term, inasmuch as in a fiducia the duties of the formal owner are left to his 'good faith,' and accordingly depend on the circumstances of the case and the discretion which a man of honour would be expected to exercise; whereas, on the other hand, the duties of the familiae emtor are accurately defined by the nuncupatio in such a manner as to bind him rigorously to their performance. The mancipatio to the familiae emtor is not made 'fidei fiduciae causa' (with a reference to other collateral agreements), but rather with a nuncupatio which is complete in itself, which forms part and parcel of the mancipatory act, and which leaves no doubts whatever as to the precise nature of the duties to be performed. A fiducia is a mancipatio with an undefined trust-clause, a mancipatory will is a mancipatio with a strictly defined trust-clause. Hence a fiducia gives rise to an actio bonae fidei (p. 36), a nuncupatio to actiones stricti juris. The obligation of the familiae emtor to fulfil the commission, which the nuncupatio annexed to the mancipatio familiae imposes upon him, enjoys the full protection of the Twelve Tables: § 99.

Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto[5].

The only effect indeed of such an application of mancipatio to the familia of the testator was, in the first instance, to enable the testator

[5] Cp. sup. p. 32 ff.

§ 99. to give bequests[6]. It could not enable him to make another person heres, because the familiae emtor himself was formally the sole owner of the estate (heres). Accordingly the words used by the testator in his nuncupatio are merely as follows: haec ita ut in his tabulis cerisque sunt, *ita do*, *ita lego*, *ita testor*[7], itaque vos Quirites testimonium mihi perhibetote. As far as its contents are concerned, the mancipatory will is merely a will for giving legacies. It was not till later when the notion of the familiae emtor's ownership became obliterated, and, still more, when the familiae emtor ceased to be regarded as the agent and executor of the testator and assumed the rôle of a person whose presence was merely required for formal purposes, that the inheritance, so to speak, disencumbered itself of his ownership. Accordingly it became, henceforth, the foremost object of every will to provide the inheritance with an owner, viz. the heres, and thereby to appoint a person who should be answerable to the creditors for the debts of the estate. It had formerly been the function of the familiae emtor not only to pay the legacies, but also to pay the debts of the deceased. When, in the course of time, both these functions ceased to be regarded as properly incumbent upon the familiae emtor, it became the legal duty of the testator to fill up the vacancy thus created by instituting an heir. It was thus that the Roman testament assumed the form in which it has been 'received' in Germany. The mancipatory will of the original type was conceived on the old traditional lines of a mere singular succession on death. The interests of the creditors of the estate, and also of the legatees, rendered the testamentary institution of an heir imperative, and it was under the pressure of such interests that the Roman will

[6] On the limited rôle thus played by the mancipatory will, in its original form, v. Schulin, *loc. cit.* p. 54 ff. The author, in the same place, lays much stress on the fact that the familiae emtor was merely the 'curator' of the estate, and assumes accordingly that this involves a contradiction with the real nature of mancipatio. We have endeavoured in the text to show that such an assumption is unfounded. The conveyance of ownership (mancipatio) is just the very means by which a valid mandatum is imposed. The same thing occurs in the case of a trustee in German law. In the old law mere consensus is not sufficient to constitute a valid mandatum.

[7] Testari means merely 'to declare in the presence of witnesses' (testes), Schulin, *loc. cit.* p. 58. Sometimes it even means a mere declaration of intention as such; Kipp, *Die Litisdenuntiation*, p. 62 ff.

became a juristic act the essence of which is that it provides, first and foremost, for the appointment of a successor to the personality of the testator; the essence of which is, in a word, that it operates a *universal succession*. It is thus we arrive at the rule which governs the mancipatory wills of the later type: velut caput et fundamentum intellegitur totius testamenti heredis institutio (Gajus II § 229). And to such lengths was this rule carried that, according to the classical law, all testamentary dispositions which preceded the institution of the heir, were held void. § 99.

In the classical law the testamentum calatis comitiis has ceased to exist. The will of the classical civil law is the mancipatory will.

Gaj. Inst. II § 101: Testamentorum autem genera initio duo fuerunt. Nam aut calatis comitiis testamentum faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in procinctu, id est, cum belli causa arma sumebant. Procinctus est enim expeditus et armatus exercitus. Alterum itaque in pace et in otio faciebant, alterum in proelium exituri.

§ 102 eod.: Accessit deinde tertium genus testamenti, quod per aes et libram agitur. Qui neque calatis comitiis, neque in procinctu testamentum fecerat, is, si subita morte urguebatur, amico familiam suam, id est patrimonium suum, mancipio dabat, eumque rogabat quid cuique post mortem suam dari vellet. Quod testamentum dicitur per aes et libram, scilicet quia per mancipationem peragitur.

§ 103 eod.: Sed illa quidem duo genera testamentorum in desuetudinem abierunt; hoc vero solum, quod per aes et libram fit, in usu retentum est. Sane nunc aliter ordinatur quam olim solebat. Namque olim familiae emptor, id est, qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator quid cuique post mortem suam dari vellet. Nunc vero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius, dicis gratia, propter veteris juris imitationem familiae emptor adhibetur. § 104: Eaque res ita agitur. Qui facit testamentum, adhibitis, sicut in ceteris mancipationibus, V testibus civibus Romanis puberibus et libripende, postquam tabulas testa-

§ 99. menti scripserit, mancipat alicui dicis gratia familiam suam. In qua re his verbis familiae emptor utitur: FAMILIA PECUNIAQUE TUA ENDO MANDATELA TUA CUSTODELAQUE MEA, QUO TU JURE TESTAMENTUM FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC AERE, et ut quidam adjiciunt, AENEAQUE LIBRA, ESTO MIHI EMPTA. Deinde aere percutit libram, idque aes dat testatori, velut pretii loco. Deinde testator, tabulas testamenti tenens, ita dicit: HAEC ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT, ITA DO, ITA LEGO, ITA TESTOR, ITAQUE VOS QUIRITES TESTIMONIUM MIHI PERHIBETOTE. Et hoc dicitur nuncupatio: nuncupare est enim palam nominare.

II. Wills in the Praetorian Law.

The praetorian law of wills took as its starting-point the mancipatory will of the civil law, but proceeded to develop it into a new form of will. Subsequently to the adoption of mancipatory wills, it became a frequent custom for testators to confine the nuncupatio to a solemn declaration that a document, exhibited by them, contained a record of their last wishes. For the purpose of establishing the identity of this document (tabulae), it was usual for the seven attesting parties who were present, viz. the five witnesses, the libripens, and the familiae emtor—the last two having likewise shrunk to the position of mere witnesses—to close the tabulae with their seals. The unbroken seals of the seven witnesses were proof that the document produced was identical, in all respects, with the one concerning which the testator had declared, in the mancipatio familiae, that it contained a record of his last will.

It was clear that the tabulae and the seven seals of the witnesses, by which they were closed, constituted the essential part of the whole act of testation. The ceremony of mancipatio with aes and libra had dwindled to a mere empty formality. The praetor realized this fact and acted accordingly. He granted to any person who could produce such a document sealed with seven seals (i. e. an undoubted testamentary instrument) the bonorum possessio secundum tabulas, and he granted it even in cases where the forms of the mancipatio had not been complied with.

A new form of will which the praetorian law was ready to acknowledge had thus been developed. The mancipatory will of the civil law wore the form of an agreement, i. e. of a *bilateral* juristic act, which could only be completely constituted by the co-operation of the familiae emtor and a signification of acceptance on his part. In dispensing with the mancipatio, the praetor, at the same time, rendered the familiae emtor as such and his declaration of concurrence superfluous. In the eye of the praetorian law the familiae emtor had become, in form as well as in substance, a mere witness. All that was required was that the testator should, in the presence of seven witnesses called in for the purpose, declare that the document in question embodied his testamentary dispositions. It was thus only through the medium of the praetorian law that the execution of a will became a *unilateral* juristic act. § 99.

A bonorum possessio secundum tabulas, which was granted on the basis of a will sealed with the seals of seven witnesses[8], was a bonorum possessio juris civilis adjuvandi gratia, if the forms of mancipatio had been observed. But if the forms of mancipatio had not been observed, a bonorum possessio secundum tabulas was originally only granted by the praetor juris civilis supplendi gratia, that is, it was granted merely as a provisional arrangement, as long as no civil heir ab intestato came forward to claim the inheritance. It was not till a rescript of Antoninus Pius that, in such circumstances, the bonorum possessor was allowed to meet the hereditatis petitio of the legitimus heres with an exceptio doli. The effect was to convert a bonorum possessio secundum tabulas, when granted in the absence of a mancipatio—and it is probable that by this time the absence of mancipatio was the rule—into a bonorum possessio juris civilis corrigendi gratia. The civil law testament thus underwent a complete reform at the hands of the praetor. A will ceased to be a bilateral mancipatory act, and definitely assumed the form of a unilateral act of testation in the sense in which the term is understood in the later law.

[8] It was a further requirement that each witness should place his signature next to his seal. This was called 'adscribere' or 'adnotare' (l. 22 § 4, l. 30 D. qui test. 28, 1), at a later period, 'superscriptio.'—Cp. the edict, sup. p. 425, n. 1.

§ 99. GAJ. Inst. II § 119: Praetor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti bonorum possessionem pollicetur; et si nemo sit, ad quem ab intestato jure legitimo pertineat hereditas, . . . ita poterunt scripti heredes retinere hereditatem: nam idem juris est, et si alia ex causa testamentum non valeat, velut quod familia non venierit aut nuncupationis verba testator locutus non sit. § 120: Sed videamus an, etiamsi frater aut patruus extent, potiores scriptis heredibus habeantur: rescripto enim imperatoris Antonini significatur, eos qui secundum tabulas testamenti non jure factas bonorum possessionem petierint, posse adversus eos qui ab intestato vindicant hereditatem, defendere se per exceptionem doli mali.

III. Wills in Justinian's Law.

Justinian's law, following up the preceding imperial legislation, and adhering to the conception of a will as established by the praetorian law, developed the following forms of wills:

1. The ordinary private will is the will which is executed in the presence of seven qualified witnesses called in for the purpose[9]. It may be executed either orally or in writing. An oral will is executed by means of a verbal declaration addressed by the testator to the witnesses and expressing his last wishes. A written will is executed as follows: the testator makes a declaration that a document produced by him and shown to the witnesses is his will; he thereupon puts his signature (subscriptio) to the document, and the witnesses do the same, and finally the witnesses affix their seals and append their names (v. note 8). In either case there must be a 'unitas actus,' i. e. the execution of the will must not be interrupted by any intervening act.

[9] No person is qualified to act as a testamentary witness—the term 'testamenti factio' is also used to describe such a qualification—unless he has the testamenti factio activa, unless, in other words, he enjoys full proprietary capacity according to the Roman civil law, and also complete capacity of action (sup. p. 448). Thus, unfree persons, aliens, women, impuberes, furiosi, and prodigi are not competent witnesses. In addition to these, persons who are unfit to act as witnesses by reason of some special defect, such as blindness and dumbness, and persons who are not independent in their relations to the testator, are also excluded. The latter class includes those in the power of the testator and the instituted heir, together with all those who are connected with the latter by patria potestas.

§ 99.

2. In addition to the ordinary form, there are, in Justinian's law, certain special forms of wills. The only person who, in Roman law, can make a valid will without any formality whatever is a soldier on active service (testamentum militis). In some cases the formal requirements of the law are relaxed. Thus, during the prevalence of a contagious disease, the witnesses need not all be present at one and the same time, but may be called in successively to attest the will (testamentum pestis tempore). And, again, in the country five witnesses are sufficient in an emergency, but, if the will is in writing, they must be informed of its contents (testamentum ruri conditum). In other cases the requirements of the law are more stringent. Thus when a blind person wishes to execute a will, an eighth witness must be present for the purpose of reading the contents of the testamentary document to the other witnesses, and he must join in signing and sealing the will (testamentum caeci). Public wills are privileged in respect of their *form*: they are validly executed without any further solemnity by the delivery of the testamentary document to the emperor (testamentum principi oblatum), or by an entry of the testator's dispositions on the records of the court (testamentum apud acta conditum). The so-called testamentum parentis inter liberos, i. e. a will benefiting none but the descendants of the testator, is privileged by reason of its *contents*; if it is oral, it may be validly executed in the presence of only two attesting witnesses; if it is in writing, it may be validly executed by means of a memorandum bearing the date of the execution and written in the handwriting of the testator.

§ 1 I. de test. ord. (2, 10): Quod per aes et libram fiebat (testamentum), licet diutius permansit, attamen partim et hoc in usu esse desiit. § 2: Sed praedicta quidem nomina testamentorum ad jus civile referebantur. Postea vero ex edicto praetoris alia forma faciendorum testamentorum introducta est; jure enim honorario nulla emancipatio desiderabatur, sed septem testium signa sufficiebant, cum jure civili signa testium non erant necessaria. § 3: Sed cum paulatim tam ex usu hominum quam ex constitutionum emendationibus coepit in unam consonantiam jus civile et praetorium jungi, constitutum

§ 99. est, ut uno eodemque tempore, quod jus civile quodammodo exigebat, septem testibus adhibitis et subscriptione testium, quod ex constitutionibus inventum est, et ex edicto praetoris signacula testamentis imponerentur: ut hoc jus tripertitum esse videatur, ut testes quidem et eorum praesentia uno contextu testamenti celebrandi gratia a jure civili descendant, subscriptiones autem testatoris et testium ex sacrarum constitutionum observatione adhibeantur, signacula autem et numerus testium ex edicto praetoris.

§ 10 eod.: Sed neque heres scriptus, neque is qui in potestate ejus est, neque pater ejus qui eum habet in potestate, neque fratres qui in ejusdem patris potestate sunt, testes adhiberi possunt, quia totum hoc negotium, quod agitur testamenti ordinandi gratia, creditur hodie inter heredem et testatorem agi. Licet enim .... veteres, qui familiae emptorem et eos qui per potestatem ei coadunati fuerant, testamentariis testimoniis repellebant, heredi et his qui conjuncti ei per potestatem fuerant, concedebant testimonia in testamentis praestare . . .; tamen nos . . . ad imitationem pristini familiae emptoris merito nec heredi, qui imaginem vetustissimi familiae emptoris obtinet, nec aliis personis, quae ei (ut dictum est) conjunctae sunt, licentiam concedimus sibi quodammodo testimonia praestare.

§ 14 eod.: Si quis autem voluerit sine scriptis ordinare jure civili testamentum, septem testibus adhibitis et sua voluntate coram iis nuncupata, sciat hoc perfectissimum testamentum jure civili firmumque constitutum.

3. As regards the contents of a will, the essential part is, as we have already observed, the institution of the heir. The testator's intention to institute an heir must be expressed in precise and categorical language. Accordingly in Roman law, the institution of 'incertae personae,' as, for example, 'the poor' is void. Persons who cannot be ascertained till after the execution of the will (e. g. quisquis primus ad funus meum venerit, heres esto), or are not born till after such execution, are likewise personae incertae. The only exception to this rule is in favour of the postumi sui (sup. p. 416), and testators were allowed—though only by a gradual

process—both to institute and disinherit postumi sui in their wills (inf. p. 463). Originally, too, the institution of a juristic person was void, a juristic person being regarded as a persona incerta. Subsequently, however, *public* juristic persons were granted a general testamenti factio passiva (sup. p. 449), and, in Justinian's law, an institution of personae incertae for charitable purposes (e. g. an institution of the poor or the sick) was interpreted as an institution of the church and, as such, was upheld. § 99.

The institution of an heir may not be made subject to a restriction as to time (dies) nor to a resolutive condition, so far as it is the object of such restriction or condition to limit the effect of the vesting of the inheritance[10]. If, nevertheless, words of such import are inserted, they are deemed unwritten. For the rule is: 'semel heres semper heres.' On the other hand a suspensive condition is admissible. What is known as 'substitution' is a special case of an institution with a suspensive condition. Substitution is the appointment of a second heir who is to take in the event of the first-appointed heir—the heres institutus—not succeeding to the inheritance (plures gradus heredum facere). Impossible and immoral conditions annexed to the institution of the heir are deemed unwritten.

Ulpian. tit. 24 § 15: Ante heredis institutionem legari non potest, quoniam vis et potestas testamenti ab heredis institutione incipit.

Eod. tit. 21: Heres institui recte potest his verbis: Titius heres esto, Titius heres sit, Titium heredem esse jubeo. Illa autem institutio: Heredem instituo, heredem facio, plerisque improbata est.

Eod. tit. 22 § 4: Incerta persona heres institui non potest, velut hoc modo: quisquis primus ad funus meum venerit, heres esto: quoniam certum consilium debet esse testantis.

Eod. § 5: Nec municipium nec municipes heredes institui possunt, quoniam incertum corpus est, et neque cernere universi neque pro herede gerere possunt, ut heredes fiant. Senatus-

[10] Cp. Eisele, in Jhering's *Jahrbücher*, vol. xxiii. p. 132 ff.

§ 99. consulto tamen concessum est, ut a libertis suis heredes institui possint.

Eod. § 6: Deos heredes instituere non possumus praeter eos quos senatusconsulto constitutionibusve principum instituere concessum est, sicuti Jovem Tarpejum, Apollinem Didymaeum Mileti . . .

Eod. § 19: Eos qui in utero sunt, si nati sui heredes nobis futuri sint, possumus instituere heredes: si quidem post mortem nostram nascantur, ex jure civili; si vero viventibus nobis, ex lege Junia.

§ 9 I. de hered. inst. (2, 14): Heres et pure et sub condicione institui potest: ex certo tempore, aut ad certum tempus non potest. § 10: Impossibilis condicio in institutionibus et legatis, nec non in fideicommissis et libertatibus pro non scripto habetur.

§ 100. *Succession by Necessity.*

§ 100. The original idea of a will is that it enables a person, who has no son, to provide a son for himself (sup. p. 449), who shall 'perform all the duties of the testator, human and divine'[1], that is, pay his debts and offer the funeral sacrifices. It follows, as a matter of course, that, where there are sons, there is no room for a will. This is the condition of the law as we find it in ancient Attica, where the rule was that a man who had lawful sons could not make a will. At a later stage, however, a man who had sons was permitted to make a will in which he appointed his sons heirs, or to make a will for the event of his sons not surviving him, or, at any rate, if they did survive him, dying before they attained majority[2]. There are strong grounds for believing that early Roman law passed through a very similar course of development. If a man had a filius suus, he could not, at the outset, make a will at all; if he had a daughter or a grandchild in immediate paternal power, he could, it is true, make a will, but he could only appoint a stranger testamentary heir

[1] Compare the law of Gortyn in Crete, about 400 B. C. x. 42, 43, in Zitelmann's *Das Recht von Gortyn*, p. 134 (sup. p. 387, n. 3).

[2] Schulin, *loc. cit.* p. 15.

together with the daughter or grandchild—a rule which probably § 100.
contains the germ of the subsequent jus accrescendi of such sui (v. infra)[3]. As against the sui, the power to make a will was excluded by the mere fact that, on the death of the father or grandfather, the suus heres was deemed ipso jure in possession of the inheritance (p. 426), so that, even if testamentary heirs were appointed, there was no possibility of their obtaining possession (i. e. making cretio). Nevertheless, as in Athens so in Rome, the power to make a will notwithstanding the existence of sui came ultimately to be acknowledged. In Rome the development of the law resulted in the adoption of the principle of an unrestricted testamentary power, and it was only in certain formal requirements of wills that the associations of the original substantial claims of the sui continued to live on. It is probable that, as in other branches of the law, so here, the ultimate result was not reached by any abrupt change, but by a series of intermediate modifications of the earlier doctrine[4]. However this may be, the outcome was that, with the obliteration of the notion of the sui being ipso jure in possession of the inheritance, the ancient conception of family ownership lost all practical influence and made way for patria potestas with its paramount power of disposition over the property and the members of the household. That such was the earliest history of the Roman law of succession by necessity is an assumption which is supported by the form in which that law is actually presented to us in the historical records of Roman law.

So far as Roman law can be historically authenticated, the law of

[3] In support of this supposition v. Schirmer, *ZS. d. Sav. St.* vol. ii. p. 170 ff.; Salkowski, *ibid.* vol. iii. pp. 201, 202.

[4] The existence of such intermediate stages seems to be indicated more particularly by the system of 'pupillary substitutions' which was developed in Athens as well as in Rome. A 'pupillary' substitution—which is opposed to a 'simple' substitution (substitutio vulgaris, sup. p. 459)—means, in the classical law, a will which a testator makes for an impubes in his power, to take effect in case the latter 'intra pubertatem decesserit.' Originally, however,—and there are a number of later legal rules which bear testimony to this fact—a pupillary substitution meant a will made by the father *for himself*, in case namely his suus should, after surviving him, die before attaining the age of puberty. The father may therefore make a will notwithstanding the existence of a filius suus, but such a will can only take effect (just as in Attic law), if the suus predeceases his father, or, at any rate, dies ante pubertatem.

§ 100. succession by necessity is, in its nature, either formal or material. It is formal in the sense that it affects the form of wills, by providing that every will shall contain either an institution or a disinherison of the heir by necessity, in other words, by providing that the testator shall make express mention of his heir by necessity. It is material in the sense that it affects the substance of wills, by providing that in every will the testator shall give his heir by necessity a certain portion—a 'statutory' portion—of his property, in other words, that the testator shall confer a material benefit on his heir by necessity.

The earliest phase of development being closed, Roman law starts, in historic times, with a purely formal law of succession by necessity, and proceeds then to work out a material law of succession by necessity. Finally, under Justinian, a uniform system is effected by a fusion of the formal and material law.

I. According to the civil law, the sui heredes are the only persons who have a right of succession by necessity, but their right is a purely formal one. That is to say, it is one of the formal requirements of a valid will that the sui heredes shall either be instituted or disinherited. If the testator wishes to dispose of his estate in favour of other persons, he must first expropriate those who are co-owners of his property (exheredes facere), for, unless he does so, his property is encumbered and incapable of free disposition in favour of others. In this requirement of exheredatio we have a last trace or, perhaps, in a certain sense, an acknowledgment of the rights of the family — the family of descendants, namely — as owners of the estate[5]. In order to extinguish the claims of the family and to convert the property into the free and unrestricted property of the holder, an exheredatio is indispensable. And the law requires that a filius suus shall be disinherited 'nominatim,' i. e. by special mention; in the case of daughters and grandchildren, it is sufficient if the will contains the clause which every prudent Roman was in the habit of appending to the in-

[5] Hölder says (*Z.S. d. Sav. St.* vol. iii. p. 219): 'Like all acts of expropriation a testamentary exheredatio, being an act which extinguishes a private right in due legal form, implicitly recognises the existence of the right it extinguishes.'

stitution of the heir: ceteri exheredes sunto ('exheredatio inter ceteros'). § 100.

If the formal requirements of the law concerning the right of heirs by necessity were not satisfied, in other words, if a suus was passed over—being neither instituted nor disinherited ('praeteritio')—the result was different, according as the suus was a filius suus or otherwise. If a filius suus was passed over, the formal defect was fatal to the will and intestate succession took place. If other sui —daughters or grandchildren—were passed over, the will remained valid, but the sui praeteriti came in together with the heirs appointed in the will (scriptis heredibus adcrescunt); if the latter were extranei, the sui praeteriti took together one moiety of the estate; if they were sui, each suus took an equal share (portio virilis).

Nor, again, is it sufficient, if the suus is disinherited or instituted *on a condition*—unless indeed the condition is one which merely depends for its fulfilment on the free option of the person conditionally instituted (a so-called 'condicio potestativa')—he must also be instituted or disinherited for the event of the condition failing. If the testator has provided for the appointment of several 'degrees' of heirs by means of an institutio and substitutio (sup. p. 459), the suus who is not instituted must be expressly disinherited 'ab omnibus gradibus,' i. e. the testator must declare his intention to disinherit him both as against the institutus and the substitutus—for which purpose, amongst other modes, an exheredatio at the beginning of the will (ante heredis institutionem) will suffice.

At the outset a difficulty arose in connection with the postumi sui (sup. p. 416), who, being personae incertae (p. 458), could neither be instituted nor disinherited. With regard, however, to such postumi as were born after the death of the testator ('postumi legitimi'), traditional usage invested them with testamenti factio passiva, and a lex Junia Velleja conferred the same capacity on postumi born in the life-time of the testator, but after the execution of the will ('postumi Vellejani'). And prior to the last-named enactment, the praetor Gallus Aquilius had devised a formula by which it became possible effectually to institute a grandson by a son, who was born

§ 100. after the execution of the will, but who became the suus heres of his grandfather in consequence of the death of his (the grandson's) father during the life-time of the testator ('postumi Aquiliani'). It was thus that postumi sui gradually became capable of being effectually instituted and disinherited. A postumus filius must be disinherited nominatim; in the case of other postumi, an exheredatio inter ceteros is sufficient; if, however, the testator uses a general clause of this kind, he is bound to leave the disinherited daughters and grandchildren a legacy, in order to show that in using the clause 'ceteri exheredes sunto,' he had not overlooked such postumi. Hence it was thought more prudent, even in the case of these other postumi, to disinherit them by express mention (nominatim).

The praeteritio of a postumus suus—whether a son, a daughter, or a grandchild—operated in all cases to invalidate the entire will ('ruptio testamenti') and to produce an intestacy.

II. According to the praetorian law not only the sui, but all the liberi (sup. p. 438), have a formal right of succession by necessity, the rule being that male liberi (sons and grandsons) shall be disinherited nominatim, an exheredatio inter ceteros sufficing only in case of female liberi. The effect of praeteritio in the praetorian law is a bonorum possessio contra tabulas (juris civilis corrigendi gratia); it does not, accordingly, operate to nullify the will, but merely gives rise to a legal remedy by means of which a praeteritus, who has actually obtained the bonorum possessio contra tabulas from the praetor, is enabled—by the aid of the remedies of a bonorum possessor, viz. the interdictum quorum bonorum and the hereditatis petitio possessoria—successfully to uphold, as against the testamentary heirs, his contratabular praetorian title to the amount of his intestacy share. Accordingly the testamentary institutions of heirs, and all legacies and manumissions which are based on such institutions, fall to the ground. On the other hand, the appointments of guardians, the pupillary substitutions (p. 461, note 4), and, more especially, the disinherisons in the will remain in force. If, therefore, a person who has a right of succession by necessity is duly disinherited, the praetor will not admit him to the bonorum possessio

contra tabulas. Where, however, a person who has a right of succession by necessity, is duly instituted heir, and another person, who is heir by necessity, obtains bonorum possessio contra tabulas (commisso per alium edicto), on the ground of his having been improperly passed over, in such a case the instituted heir may, if he finds it more advantageous to do so, apply for bonorum possessio contra tabulas in respect of his intestacy share. If bonorum possessio contra tabulas is not applied for within the prescribed period (the annus utilis), the will remains in full force. On the other hand, the female liberi and grandchildren were accorded this privilege by the praetorian law, that they not only enjoyed the jus accrescendi, i.e. the right to come in concurrently with the testamentary heirs (sup. p. 463), but could obtain their entire intestacy share by bonorum possessio contra tabulas. The praetorian law was amended in this respect by a rescript of Marcus Aurelius which provided that female liberi should only take, by bonorum possessio contra tabulas, such share as they would have been entitled to by virtue of the civil jus accrescendi. § 100.

III. What we have called the material law of succession by necessity is likewise of civil law origin. A will, in which the testator passes over his nearest relations in order to make over his property to strangers, is thought to argue a lack of natural affection, and is called an 'unduteous' will ('testamentum inofficiosum'). The relations who have been passed over are entitled to impeach and set aside such a will on the plea that it was exectued by a person of unsound mind (querela inofficiosi testamenti)[6].

The following persons were held entitled to claim a statutory share: descendants, ascendants, brothers and sisters of the whole blood, and consanguinei (who descend from the same father), but not uterini; brothers and sisters, however, are only entitled, when a persona turpis (sup. p. 128) was preferred to them in the will. No person can, in any case, claim a statutory share, unless he would

[6] The fiction of insanity (color insaniae) is probably due to the reception of Greek law. In the early Attic law we find precisely the same form for impeaching an unduteous will as in Rome, the testator being accused by his relatives of *μανία*; cp. Schulin, *loc. cit.* p. 16, where the author also makes out a good case for believing that the Greek courts went further in their recognition of claims to a statutory share than the Roman centumviral court.

§ 100. actually have had a right of succession if the deceased had died intestate. The requirements of the law in regard to the statutory share were not satisfied, unless the person entitled to such share received at least one fourth of what he would have taken on intestacy. But the testator cannot be required to give this fourth by instituting the claimant heir, and in no other manner. The law is satisfied, if he gives the fourth by his will in any manner whatever, either by appointing the person entitled heir or by means of a legacy, or in any other way. But the fourth must be given clear of all charges and limitations, it must not be encumbered with a legacy, or hampered with a condition or a restriction as to time (dies) or as to the purpose to which it is to be devoted (modus). The gift was inoperative, if it was thus hampered. In Justinian's law all such limitations are simply nugatory.

If a person entitled to a statutory share has either received nothing at all, or has received less than his share, he may proceed by the querela inofficiosi testamenti against the persons appointed heirs in the will, with a view to recovering the full amount of his intestacy share. To this extent the will is rescinded; for the rest, its provisions remain in force. If, however, the intestacy shares of the petitioners in the querela exhaust the entire estate, the whole will falls to the ground with all its provisions (legacies, &c.).

If the testator had some good reason for excluding the person claiming a statutory share, the querela inofficiosi testamenti is dismissed on the ground that the evidence has shown that, in excluding the claimant, the testator was acting reasonably. The question as to whether the grounds of exclusion were relevant or otherwise, is a matter for the free discretion of the judge. There were no statutory grounds of disinherison.

Since the querela inofficiosi testamenti implies a slur on the personal character of the testator, it is barred, like every other action de statu defuncti, within five years from his death. And further, since it is an 'actio vindictam spirans,' i. e. an action which has for its object the personal satisfaction of the plaintiff (sup. p. 329), it is not transmissible to the plaintiff's heirs.

IV. Justinian accomplished a series of reforms on the subject

of succession by necessity. In the first place, he enacted that § 100.
where a person, who was entitled to a statutory share, received something under the will, but not enough, such person should not be allowed to sue by querela inofficiosi testamenti for his full intestacy share, but should be required to proceed by an 'actio ad supplendam legitimam,' the object of which was merely to compel the testamentary heirs to pay out the statutory share in full. By a further innovation—effected by the 18th Novel—he raised the amount of the statutory share to one third of the intestacy share where the portion of the inheritance which the claimant would have taken on intestacy amounted to at least one fourth of such inheritance, and to one half of the intestacy share, where such portion amounted to less than one fourth of the inheritance.

But Justinian's most important reform was accomplished by the 115th Novel.

The effect of the 115th Novel was to create a fusion of the formal and the material law of succession by necessity as between ascendants and descendants. Ascendants are required to institute as heirs such of their descendants as would be entitled to succeed them on intestacy, and vice versa[7]. Disinherison is only permissible on certain definite statutory grounds which are specified in the 115th Novel; as, for example, on the ground of an attempt on the testator's life, and others. The testator must expressly state the ground of disinherison in his will.

If these requirements are not satisfied, and the claimant, though instituted heir, is given but an insufficient share, he can only proceed by the actio ad supplendam legitimam. If, on the other hand, the testator, in addition to instituting him heir to a certain share, makes up the statutory amount either by means of a legacy or by some other provision in his will, the actio ad supplendam legitimam is excluded. If any limitations are imposed on the statutory share, such limitations are taken pro non scriptis. Where, however, the claimant is not instituted heir, and no statutory ground of dis-

[7] The rule, however, that a will is not void on the mere ground that the statutory share has not been given by the institution was not altered. If a person is instituted to an amount falling short of his statutory share, he can bring an actio ad supplendam legitimam (see the text).

§ 100. inherison is specified, he has a modified querela inofficiosi testamenti, which operates to rescind the institutions to the extent of his full intestacy share, but leaves the remaining dispositions of the will untouched, e.g. the appointments of guardians, the pupillary substitutions, and also the legacies, so far as the latter do not reduce the statutory share.

As regards brothers and sisters, their rights remained unaltered; they continued as heretofore to be merely entitled to a statutory share and had no claim to be benefited by means of an institution as heirs. If personae turpes are instituted testamentary heirs, brothers and sisters of the deceased, who are given nothing by the will, can sue them by the querela inofficiosi testamenti for the amount of their intestacy share; if the amount given them falls short of their statutory share, they can only proceed by an actio ad supplendam legitimam for the payment of such share in full.

Nov. 115 c. 3: Sancimus igitur non licere penitus patri vel matri, avo vel aviae, proavo vel proaviae, suum filium, vel filiam, vel ceteros liberos praeterire, aut exheredes in suo facere testamento, nec si per quamlibet donationem, vel legatum, vel fideicommissum, vel alium quemcunque modum, eis dederit legibus debitam portionem; nisi forsan probabuntur ingrati, et ipsas nominatim ingratitudinis causas parentes suo inseruerint testamento. Sed quia causas, ex quibus ingrati liberi debeant judicari, in diversis legibus dispersas et non aperte declaratas invenimus, . . . ideo necessarium esse perspeximus eas nominatim praesenti lege comprehendere, ut praeter ipsas nulli liceat ex alia lege ingratitudinis causas opponere, nisi quae in hujus constitutionis serie continentur. —

c. 4 pr.: Sancimus itaque non licere liberis parentes suos praeterire, aut quolibet modo a rebus propriis, in quibus habent testandi licentiam, eos omnino alienare, nisi causas quas enumeravimus in suis testamentis specialiter nominaverint.—

8 eod.: Si autem haec omnia non fuerint observata, nullam vim hujusmodi testamentum, quantum ad institutionem heredum, habere sancimus: sed, rescisso testamento, eis qui ab intestato ad hereditatem defuncti vocantur, res ejus dari

disponimus: legatis videlicet, vel fideicommissis et libertatibus et tutorum dationibus, seu aliis capitulis . . . suam obtinentibus firmitatem. § 100.

§ 101. *The Effect of the Vesting of the Inheritance.*

I. The effect of the vesting of the inheritance is to constitute the heir universal successor of the deceased (sup. p. 412). The heir steps into the place of the deceased in respect not only of his rights, but also of his liabilities, except so far as such rights and liabilities are extinguished by the death of the deceased (sup. pp. 329, 347, 408). The property of the deceased becomes the property of the heir ('confusio bonorum'), his rights and liabilities become the rights and liabilities of the heir. Accordingly the heir is answerable with his own property, if necessary, for the debts of the inheritance, and conversely, the inheritance is answerable for the personal debts of the heir. In both its aspects, however, the rule is susceptible of a modification. § 101.

The principle that the heir was answerable with his own property for the debts of the inheritance was abolished—though not till Justinian's time—by the so-called 'beneficium inventarii.' If the heir draws up an inventory of the deceased's property within a prescribed period—viz. three months at latest from the time he becomes aware of the delatio—his liability is limited to the extent of the inheritance, to the extent, in other words, of the assets of the deceased, the heir being entitled to pay the creditors in the order in which they apply to him. His liability comes to an end as soon as the inheritance is exhausted.

The principle that the inheritance is answerable for the personal debts of the heir is counteracted by the so-called 'beneficium separationis,' which was introduced by the praetor. The beneficium separationis can be obtained by an application to the judge for a 'separatio bonorum,' such application to be made by the creditors of the estate within a period of five years, and prior to the conclusion of any agreement with the heir as to the payment by him of the debts of the inheritance.

§ 101. The action by which an heir enforces his right of succession is the hereditatis petitio. The hereditatis petitio is available against any person who sets up a claim of his own to the inheritance—whether as being actually the heir (pro herede possidere) or as intending to become heir (pro possessore possidere)[1]—and pleads such claim as a ground for refusing to give up property belonging to the estate (corporis possessor), or for refusing to pay a debt which was owing to the deceased (juris possessor). If a person has possession of a res hereditaria and claims it for himself, not as heir, but on some other legal ground (on the ground, for instance, that he is the owner), the heir cannot sue by hereditatis petitio—which could be repelled by the exceptio praejudicii (v. note 1)—but must bring an action for the assertion of the separate right (whatever it may be) belonging to the estate,—a rei vindicatio, for example, if it is a right of ownership of the deceased that he desires to enforce.

A senatusconsultum under Hadrian enacted that, as against an hereditatis petitio, a usucapio pro herede should be inoperative; in other words, the person who had acquired the thing was obliged to deliver it up notwithstanding the expiry of the term of usucapio. The effect of the enactment was to deprive the usucapio pro herede —which owed its existence to the peculiarities of the earliest law of inheritance—of its most important practical function. A senatus-

[1] The typical example of a possessor 'pro possessore,' within the meaning of the classical law (i. e. of a person who, on being asked by what right he possesses, answers: quia possideo) is the so-called 'improbus pro herede possessor', i. e. the person who seizes a res hereditaria mala fide, well knowing that he is not the heir, with the purpose of acquiring it by usucapio pro herede (sup. p. 424). The heir's only remedy against such a person is the hereditatis petitio, the same remedy, that is, as he has against a bona fide pro herede possessor. If he were to sue by a 'singular' action (for example, by a rei vindicatio on the ground of the deceased's ownership), the mala fide possesor could meet him, like the bona fide possessor, by an exceptio 'ne praejudicium hereditati fiat,' the effect of which would be to compel the plaintiff (the heir) to proceed by a 'universal' action (viz. the hereditatis petitio), with a view to obtaining a decision of the question as to the *heirship*, and not merely as to the ownership of this or that particular thing. In itself the term 'pro possessore possidens' would be equally applicable to any mala fide possessor holding without just title, including persons who are neither desirous nor capable of acquiring by usucapio pro herede, such as a thief, a robber, an ejector. In such cases however, though the heir is fully entitled, if he chooses, to proceed by hereditatis petitio, the ordinary remedy would be a singular action, viz. a rei vindicatio, and possessors of this description cannot plead the above-mentioned exceptio praejudicii. Cp. Leist, *Der röm. Erbrechtsbesitz*, p. 241 ff.

consultum Juvencianum, dating from the same time (129 A.D.), § 101.
provided that, where judgment was given in an hereditatis petitio against the possessor of an inheritance, whether his possession were bona fide or mala fide, he (the possessor) should be required to restore all profit he had made by the inheritance, for example, by a sale of property belonging to the inheritance.

And, similarly, if a person has obtained bonorum possessio from the praetor, he has the interdictum quorum bonorum against any one possessing pro herede or pro possessore. The interdict, however, was only available against a corporis possessor (cp. sup. p. 434). It was therefore an important step when, at a later date, the praetor gave the bonorum possessor a utilis hereditatis petitio (a so-called 'hereditatis petitio possessoria') which was equally available against a juris possessor. The interdict quorum bonorum further enabled the successful plaintiff to recover his property from a person who had acquired it pro herede notwithstanding the fact that the usucapio was complete.

If several heirs succeed concurrently, the vesting of the inheritance operates as against each of them pro parte hereditaria. The action by which co-heirs effect a partition of the inheritance among themselves is called the actio familiae erciscundae (sup. p. 320).

L. 9 D. de her. pet. (5, 3) (Ulpian.): Regulariter definiendum est eum demum teneri petitione hereditatis qui vel jus pro herede, vel pro possessore possidet, vel rem hereditariam.

L. 11. 12 eod. (Ulpian.): Pro herede possidet qui putat se heredem esse. — Pro possessore vero possidet praedo, qui interrogatus, cur possideat, responsurus sit: quia possideo, nec contendet se heredem, vel per mendacium.

§ 3 I. de interd. (4, 15): Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, quod appellatur quorum bonorum. Ejusque vis et potestas haec est, ut, quod ex his bonis quisque, quorum possessio alicui data est, pro herede, aut pro possessore possideat, id ei cui bonorum possessio data est, restituere debeat. Pro herede autem possidere videtur qui putat se heredem esse. Pro possessore is possidet qui nullo jure rem hereditariam, vel etiam totam hereditatem, sciens ad se non pertinere, possidet.

§ 101. L. 2 D. de poss. her. pet. (5, 5) (GAJUS): Per quam hereditatis petitionem tantundem consequitur bonorum possessor, quantum superioribus civilibus actionibus heres consequi potest.

II. In some cases the law places obstacles in the way of the vesting of an inheritance.

1. Inability to become heir.

By virtue of certain special enactments children of persons guilty of high treason, apostates and heretics, and also widows who violate their year of mourning, are, in the law of the empire, incapable of becoming heirs. As regards widows, however, their disqualification only extends to testamentary inheritances and to inheritances devolving upon them on intestacy ultra tertium gradum. In other respects the capacity of becoming an heir is, in Justinian's law, part of a person's general proprietary capacity, provided only that the heir was in existence—at any rate as a nasciturus—at the date of the deceased's death (sup. pp. 101, 449). Inability to become an heir prevents a delatio taking place. Whenever such inability occurs, the inheritance devolves just as though the disqualified party did not exist.

2. Incapacity.

Incapacity, in the technical sense of the term, means merely inability to acquire under a will. Incapacity does not prevent the delatio, but only the acquisitio of the inheritance. Incapacity, in this sense, is unknown in Justinian's law. The most notable case, prior to Justinian, was the incapacity annexed by the lex Julia et Papia Poppaea to caelibes and orbi, caelibes being incapacitated from taking anything as heirs or legatees under a will, orbi being only entitled, in the same circumstances, to take a moiety of what was given them (sup. p. 385).

3. Unworthiness.

Unworthiness does not prevent either delatio or acquisitio. But the law declares that the property which has vested in an indignus shall be divested again (eripi), either in favour of the fiscus or in favour of a third party who is entitled (bona ereptoria). It is, for instance, a rule that if the heir kills the testator or intestate, he shall

forfeit his inheritance in favour of the fiscus. He is considered unworthy to *keep* the inheritance. § 101.

§ 102. *Bequests.*

I. Legatum. § 102.

Legatum is the formal bequest of the civil law, a bequest charged verbis imperativis, in a set form of words, on a testamentary heir by means of a will. Its sole purpose is to confer on third parties certain separate benefits at the expense of the deceased's estate. As opposed to the succession of the heir to his inheritance—which is a universal succession—the succession of a legatee to his legacy is, in its nature, a singular succession. A legatum only confers rights; there can be no bequest of debts. In the civil law a right could be granted by way of legacy in a twofold manner, either directly or indirectly.

1. The so-called 'legatum per vindicationem' operated as a direct grant of a right. Its effect was to give the legatee, at once, a vested right to the ownership of a thing, or to a servitude (praedial or personal) over a thing, belonging to the testator in quiritary ownership (e. g. Titio hominem Stichum do lego, or: Titio usumfructum fundi Corneliani do lego). A legatee taking per vindicationem could enforce his right immediately by a rei vindicatio or an action claiming the servitude (juris vindicatio), no prior traditio or grant of the servitude on the part of the heir being required.

2. The so-called 'legatum per damnationem' operated, in the first instance, as an indirect grant of a right, its effect being to create an obligation in the heir to procure the legatee the quiritary ownership in a thing, or in some other proprietary benefit. For example: heres meus Stichum servum meum dare damnas esto. In these cases the legatee did not acquire immediate ownership, but only an obligatory right to compel the heir to dare or facere (sup. p. 285). A testator, however, could bequeath per damnationem not only his own, but also other persons' property. In point of validity, the legatum per damnationem was the safest, and, in that sense, the best kind of legacy. There was another form of legacy akin to the legatum per damnationem which was called 'legatum sinendi modo,'

§ 102. the words used being: heres meus damnas esto sinere L. Titium hominem Stichum sumere sibique habere. In this latter form a testator could not only bequeath things belonging to himself, but also things belonging to the heir (not, however, things belonging to third persons). Here, again, the effect of the legatum was merely to impose an obligation on the heir, but an obligation not to dare, but only to sinere, i. e. to permit the legatee to take the thing bequeathed to him [1].

Another form of legacy, called the 'legatum per praeceptionem' (L. Titius hominem Stichum praecipito), was also related to the legatum per damnationem, but was only available for bequests of things comprised in the inheritance—whether they were in quiritary ownership or otherwise—and only where the beneficiary was one of several co-heirs. Its effect was to create a duty in the other co-heirs, in settling under a judicium familiae erciscundae—which was the proper remedy for enforcing such a legacy—to let the favoured co-heir retain the thing bequeathed to him in addition to his share of the inheritance [2].

The SC. Neronianum enacted that any legacy which would have been void by reason of the failure of the testator to comply with the forms required in the particular legacy he had chosen (e.g. a legatum per vindicationem), should be construed as a legatum per damnationem and as such be held good. The effect of every legatum, after the senatusconsultum, was to impose an obligation on the heir to carry out the terms of the bequest.

[1] A legatum sinendi modo is, in fact, a legatum per damnationem in a less stringent form, in so far as it does not oblige the heir to do any positive act. It probably marks the transition stage from the older legatum per damnationem to the legatum per vindicationem, which was of later date; the legatee is to *have* the thing without the necessity of any act of performance on the part of the heir. Cp. Hölder, *Beiträge z. Geschichte d. röm. Erbrechts*, p. 76 ff.

[2] The legatum per praeceptionem, like the legatum sinendi modo, is probably older than the legatum per vindicationem. Not being couched in the imperative language of a legatum per damnationem, it merely expresses, legally speaking, a *desire* on the part of the testator (praecipito). Accordingly a legatum per praeceptionem cannot be recovered by any independent action, and the legatee must rely on the officium judicis as exercised (ex bona fide) in the judicium familiae erciscundae for the assertion of his claim. The ownership does not vest in the legatee (i.e. the co-heir) at once by virtue of the legacy, but only by virtue of the adjudicatio of the judge in the partition suit between the heirs. Cp. Hölder, *loc. cit.* p. 80 ff.

§ 102.

Ulp. tit. 24 § 1: Legatum est quod legis modo, id est imperative, testamento relinquitur: nam ea quae precativo modo relinquuntur, fideicommissa vocantur.

Gaj. Inst. II § 193: Per vindicationem hoc modo legamus: TITIO verbi gratia HOMINEM STICHUM DO LEGO; sed et si alterutrum verbum positum sit, veluti DO aut LEGO, aeque per vindicationem legatum est; item, ut magis visum est, si ita legatum fuerit: SUMITO, vel ita: SIBI HABETO, vel ita: CAPITO, aeque per vindicationem legatum est. § 194: Ideo autem per vindicationem legatum appellatur, quia post aditam hereditatem statim ex jure Quiritium res legatarii fit; et si eam rem legatarius vel ab herede vel ab alio quocumque qui eam possidet, petat, vindicare debet, id est intendere suam rem ex jure Quiritium esse. § 196: Eae autem solae res per vindicationem legantur recte, quae ex jure Quiritium ipsius testatoris sunt; sed eas quidem res quae pondere, numero, mensura constant, placuit sufficere, si mortis tempore sint ex jure Quiritium testatoris, veluti vinum, oleum, frumentum, pecuniam numeratam. Ceteras res vero placuit utroque tempore testatoris ex jure Quiritium esse debere, id est, et quo faceret testamentum, et quo moreretur, alioquin inutile est legatum.

Eod. § 201: Per damnationem hoc modo legamus: HERES MEUS STICHUM SERVUM MEUM DARE DAMNAS ESTO. Sed et si DATO scriptum fuerit, per damnationem legatum est. § 202: Eoque genere legati etiam aliena res legari potest, ita ut heres redimere et praestare, aut aestimationem ejus dare debeat. § 203: Ea quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, velut FRUCTUS QUI IN ILLO FUNDO NATI ERUNT, aut QUOD EX ILLA ANCILLA NATUM ERIT. § 204: Quod autem ita legatum est, post aditam hereditatem, etiamsi pure legatum est, non ut per vindicationem legatum continuo legatario adquiritur, sed nihilominus heredis est, et ideo legatarius in personam agere debet, id est intendere heredem sibi dare oportere: et tum heres, si res mancipii sit, mancipio dare, aut in jure cedere, possessionemque tradere debet; si nec mancipii sit, sufficit si tradiderit.

Eod. § 209: Sinendi modo ita legamus: HERES MEUS DAMNAS ESTO SINERE LUCIUM TITIUM HOMINEM STICHUM SUMERE

§ 102. SIBIQUE HABERE. § 210: Quod genus legati plus quidem habet quam per vindicationem legatum; minus autem quam per damnationem. Nam eo modo non solum suam rem testator utiliter legare potest, sed etiam heredis sui: cum alioquin per vindicationem nisi suam rem legare non potest; per damnationem autem cujuslibet extranei rem legare potest.

Eod. § 216: Per praeceptionem hoc modo legamus: L. TITIUS HOMINEM STICHUM PRAECIPITO. § 217: Sed nostri quidem praeceptores nulli alii eo modo legari posse putant nisi ei qui aliqua ex parte heres scriptus esset: praecipere enim esse praecipuum sumere; quod tantum in ejus persona procedit qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis praecipuum legatum habiturus sit. § 219: Item nostri praeceptores, quod ita legatum est, nulla alia ratione putant posse consequi eum cui ita fuerit legatum, quam judicio familiae erciscundae, quod inter heredes de hereditate erciscunda, id est dividunda, accipi solet: officio enim judicis id contineri, ut ei, quod per praeceptionem legatum est, adjudicetur.

ULP. tit. 24 § 11: Senatusconsulto Neroniano . . . cautum est ut, quod minus aptis verbi legatum est, perinde sit ac si optimo jure legatum esset: optimum autem jus legati per damnationem est.

II. Fideicommissum.

Besides the formal legatum, an informal kind of bequest came into use which was called 'fideicommissum.' A fideicommissum arose, where the deceased, in precatory terms (verbis precativis), imposed on a person, called the 'fiduciarius,' a purely conscientious obligation (hence the name 'fidei commissum') to make over to another (the 'fideicommissarius') the pecuniary benefit thus informally bestowed on him. A fideicommissum could be created apart from the testator's will, and in the absence of any will—being imposed on the heir ab intestato — or again it could be charged on a person other than the heir, e. g. a legatee. A fideicommissum could be imposed on any person—including the fideicommissarius himself—who received any benefit from the testator in the event of his death.

It might be created by parol or by writing, and either with or without witnesses. As a rule it took the form of a letter addressed to the fiduciarius (codicilli). In spite of their informality fideicommissa became legally enforceable from the time the Emperor Augustus established an extraordinaria cognitio in favour of fideicommissarii. The magistrate—a special 'praetor fideicommissarius' was subsequently created to hear such matters—was empowered, causa cognita, to compel the fiduciarius, where he saw fit, to perform the trust in favour of the beneficiary. The right to which a fideicommissum gave rise was never a direct right of ownership, but an obligatory right against the person charged with the trust. Nevertheless it was obvious that the rules concerning the fideicommissum, the bequest of the jus gentium, were gradually subverting all the civil law rules on legacies. Practically speaking, formal and informal bequests had come to produce precisely the same result, the heir being legally compellable to make over the thing bequeathed in either case. § 102.

§ 1 I. de fideic. hered. (2, 23): Sciendum itaque est omnia fideicommissa primis temporibus infirma esse, quia nemo invitus cogebatur praestare id de quo rogatus erat. Quibus enim non poterant hereditates vel legata relinquere, si relinquebant, fidei committebant eorum qui capere ex testamento poterant. Et ideo fideicommissa appellata sunt, quia nullo vinculo juris, sed tantum pudore eorum qui rogabantur continebantur. Postea primus divus Augustus, semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere. Quod quia justum videbatur et populare erat, paulatim conversum est in adsiduam jurisdictionem, tantusque favor eorum factus est, ut paulatim etiam praetor proprius crearetur, qui de fideicommissis jus diceret, quem fideicommissarium appellabant.

Ulp. tit. 25 § 1: Fideicommissum est, quod non civilibus verbis, sed precative relinquitur, nec ex rigore juris civilis proficiscitur, sed ex voluntate datur relinquentis. § 2: Verba fideicommissorum in usu fere haec sunt: FIDEICOMMITTO, PETO, VOLO DARI, et similia. § 3: Etiam nutu relinquere fideicommissum usu receptum est.

§ 102. Eod. § 4: Fideicommissum relinquere possunt, qui testamentum facere possunt, licet non fecerint. Nam intestato quis moriturus fideicommissum relinquere potest.

Eod. § 12: Fideicommissa non per formulam petuntur, ut legata, sed cognitio est Romae quidem consulum, aut praetoris, qui fideicommissarius vocatur, in provinciis vero praesidum provinciarum.

III. The Assimilation of Legata and Fideicommissa.

The assimilation of legata and fideicommissa was effected by disencumbering the former of their traditional forms (e. g. the solennia verba), on the one hand, and by imposing certain forms on fideicommissa, on the other hand. Constantine had already enacted that legata should be valid even without solennia verba, testators being free to choose their own words. Justinian proceeded to sweep away the distinction altogether.

Under Justinian there is but one kind of bequest which is called indifferently legatum or fideicommissum.

Every bequest in Justinian's law, whatever the form in which it is created, has the effect of imposing on the heir an obligation to carry it out. The legatee's remedy is an actio in personam to enforce the legacy (the actio legati). If the testator had directly bequeathed a right of ownership or any other real right in a thing belonging to the inheritance, the real right vested in the legatee at once, in addition to his personal claim, without any traditio on the part of the heir.

As regards form, every bequest in Justinian's law must be declared either in a will or in a codicil. The formal requirements of a codicil are the same as those of a will—it can accordingly be executed either orally or in writing—except that, in the case of a codicil, five witnesses are sufficient and the seals of the witnesses can be dispensed with.

A codicil can be executed without any will (codicilli ab intestato), or in addition to a will (codicilli testamentarii); and in the latter case it may be confirmed by the will (codicilli confirmati) or otherwise (codicilli non confirmati). Justinian, however, provided that, even where a testator created a bequest by means of a simple

declaration to the person upon whom he charged it, without any formality whatever, the beneficiary should be entitled to sue; but that if the person charged denied on oath that any such bequest was in fact imposed on him, the beneficiary should not be able to recover. This was the so-called 'fideicommissum orale,' an institution testifying to the survival of the old principles of fideicommissa even in the law of the Corpus juris. § 102.

§ 3 I. de leg. (2, 20): Cum enim antiquitatem invenimus legata quidem stricte concludentem, fideicommissis autem, quae ex voluntate magis descendebant defunctorum, pinguiorem naturam indulgentem, necessarium esse duximus omnia legata fideicommissis exaequare, ut nulla sit inter ea differentia, sed, quod deest legatis, hoc repleatur ex natura fideicommissorum, et si quid amplius est in legatis, per hoc crescat fideicommissorum natura.

§ 103. *Restrictions on Bequests.*

The heir's liability for bequests is limited, of course, to the inheritance and never extends to his own property, for a bequest is, by its very nature, a benefit conferred at the expense of an inheritance. A further limitation of the heir's liability in respect of bequests becomes, however, desirable in the interests of the legatees themselves. For if the heir is directed to pay away the entire estate in legacies, it is scarcely likely that he will be disposed to accept an inheritance which is encumbered to such an extent without any advantage whatever to himself, and to accept it solely in the interests of others. He will prefer, in such circumstances, to refuse the inheritance, with the result that the legatees receive none of the benefits intended for them. It becomes therefore advisable, in the interests of the parties concerned, to effect a sort of compromise between the heir and the legatees, which shall offer the former some inducement to accept the inheritance and shall, at the same time, secure to the latter a portion, at any rate, of their legacies. § 103.

Attempts at a compromise of this kind were repeatedly made in Roman legislation. Thus a lex Furia enacted that no legatee—unless he were a close relation—should be entitled to demand more than

§ 103. 1000 asses in respect of a legacy. The lex Voconia (169 B. C.) provided that no legacy should be in excess of the amount given to the heir. The object aimed at by the legislature was at last effectually secured by the lex Falcidia (40 B. C.), which provided that a testator should, in all cases, leave his heir one clear fourth of the inheritance (the so-called 'quarta Falcidia') free of legacies. If the aggregate value of the legacies charged on the heir exceeds the limit, viz. three fourths of the share of the inheritance to which such heir is entitled, they all suffer a proportionate abatement. The lex Falcidia only applied, in the first instance, to legacies; the SC. Pegasianum (75 A. D.) subsequently extended it to fideicommissa. In any case, however, the benefits of the law only affect the heir, not a legatee who, in his turn, is charged with legacies.

GAJ. Inst. II § 224: Sed olim quidem licebat totum patrimonium legatis atque libertatibus erogare, nec quicquam heredi relinquere, praeterquam inane nomen heredis. Idque lex XII tabularum permittere videbatur, qua cavetur, ut quod quisque de re sua testatus esset, id ratum haberetur; his verbis: UTI LEGASSIT SUAE REI, ITA JUS ESTO. Quare, qui scripti heredes erant, ab hereditate se abstinebant; et idcirco plerique intestati moriebantur. § 225: Itaque lata est lex Furia, qua, exceptis personis quibusdam, ceteris plus mille assibus legatorum nomine mortisve causa capere permissum non est. Sed et haec lex non perfecit quod voluit. Qui enim verbi gratia quinque milium aeris patrimonium habebat, poterat, quinque hominibus singulis millenos asses legando, totum patrimonium erogare. § 226: Ideo postea lata est lex Voconia, qua cautum est, ne cui plus legatorum nomine mortisve causa capere liceret quam heredes caperent. Ex qua lege plane quidem aliquid utique heredes habere videbantur, sed tamen fere vitium simile nascebatur. Nam, in multas legatariorum personas distributo patrimonio, poterat testator adeo heredi minimum relinquere, ut non expediret heredi hujus lucri gratia totius hereditatis onera sustinere. § 227: Lata est itaque lex Falcidia, qua cautum est, ne plus ei legare liceat quam dodrantem. Itaque necesse est, ut heres quartam partem hereditatis habeat; et hoc nunc jure utimur.

§ 104. *Universal Fideicommissa.*

§ 104. The nature of a fideicommissum rendered it available as a vehicle for conveying any kind of request from the testator to the fiduciarius, including therefore a request that the fiduciarius should transfer to a third party—either in its entirety or in a rateable portion—the share of the inheritance which he received either ab intestato or ex testamento from the deceased. But in lending itself to such a purpose, the fideicommissum was in fact outstepping the bounds imposed on legacies proper. A fideicommissum of this kind virtually constituted a covert and indirect institution of the third party as heir. It was a form of legacy the tendency of which was to produce the effect of a universal succession.

In the beginning, indeed, it was a legal impossibility for fideicommissa of this type to realize the tendency which was inherent in them. There was no mode known to the law by which a transfer of a share of an inheritance, and more especially a transfer of the hereditary debts, could be accomplished. In order therefore to find a form—and a legal form—in which this hitherto unknown transaction might be effected, resort was had to the analogy of a transaction with which people were familiar and which had already received its full development. This transaction was the sale of an inheritance, or of a share of an inheritance. With a view to performing his fideicommissum the heres fiduciarius, who was charged with the universal fideicommissum, sold the inheritance by a fictitious sale (nummo uno) to the fideicommissarius. The result of the transaction was to bind the heres fiduciarius, as fictitious vendor of the inheritance, to hand over all the hereditary assets to the fideicommissarius, the latter being bound, in his turn, as fictitious purchaser, to save the fiduciarius (the vendor) harmless in respect of the debts of the estate. As in the case of a sale of an inheritance, so here, the parties entered into stipulationes for the purpose of more accurately defining their reciprocal obligations and rendering them enforceable by action. Nevertheless the upshot of the whole transaction was a mere singular succession. The fidei-

§ 104. commissarius acquired the rights of the deceased, but the fiduciarius remained liable for the debts, for the simple reason that he remained, in all respects, the heir. The only difference was that the fideicommissarius was bound to indemnify the heir for any liabilities he incurred [1].

It was at this point that the SC. Trebellianum (62 A. D.) took the decisive step, by enacting, in effect, that the declaration by which the heres fiduciarius transferred the inheritance should operate, immediately and of its own force, to transfer not only the assets, but also an aliquot share of the liabilities to the universal fideicommissarius. That is to say, the mere declaration by which the fiduciarius transfers the inheritance has ipso jure the effect of entitling the fideicommissarius—assuming him to have accepted the bequest—to enforce the testator's rights by praetorian actiones utiles, and, on the other hand, the effect of rendering him liable to the creditors of the estate suing—also by praetorian actiones utiles—on the debts left by the deceased. The heres fiduciarius is freed from the debts in just the same manner as he loses the assets. The universal fideicommissarius stands loco heredis to the extent of the share he takes, and is accordingly allowed the same legal remedies as the heir (fideicommissaria hereditatis petitio). The fact that he takes the debts as well as the rights distinguishes him as a *universal* successor from a person who has really received a mere legacy. The universal fideicommissum constitutes practically a new mode of instituting an heir, and a mode which, so far from being hampered with the restrictions incident to a formal institution, is governed, in all its requisites, by the far freer rules concerning fideicommissa. A universal fideicommissum may be created, like any other fideicommissum, in favour of a person who was not in existence, not even as a nasciturus, at the date of the testator's death. A universal

[1] The same effect was produced by a 'partitio legata,' which was feasible by civil law. The legatee received an aliquot share of the assets subject to an obligation to indemnify the heir to the extent of a corresponding share of the liabilities. As in the case above, so here, both parties covenanted by stipulationes (so-called 'stipulationes partis et pro parte') for the performance of their respective obligations. A comparison may also be suggested with the effects of an in jure cessio hereditatis, when carried out *post* aditam hereditatem, v. sup. p. 418, n. 3.

fideicommissum may, like any other fideicommissum, be made subject to a dies a quo, the testator providing that the heir shall not be required to hand over his share till after the lapse, say, of ten years. And again, a universal fideicommissarius, like any other fideicommissarius, may be charged with a second fideicommissum —in this case, again, a universal fideicommissum—which latter fideicommissum may, in its turn, be made subject to a condition or a limitation as to time (dies). Thus, through the medium of a universal fideicommissum, it becomes in fact possible to do what could never be done in the case of a formal heredis institutio (sup. p. 459), viz. to institute an heir subject to a dies a quo or a dies ad quem or a resolutive condition. § 104.

The result thus arrived at was modified, to some extent, by the SC. Pegasianum (75 A. D.) which extended the quarta Falcidia from legacies to fideicommissa, including universal fideicommissa (sup. p. 480). If the fourth was actually deducted by the heres fiduciarius, the result was, once more, a mere singular succession, and the necessity for stipulationes partis et pro parte arose again. But the universal fideicommissarius was, at the same time, given a power to compel the instituted heres fiduciarius to enter upon, and consequently also to transfer, the inheritance. If he availed himself of this right, the Falcidian fourth was not deducted, and the fideicommissarius—who was now a universal fideicommissarius—stepped, in all respects, into the place of the heir who had thus compulsorily entered.

Justinian brought the development to a close by consolidating the SC. Pegasianum and Trebellianum. The heres fiduciarius was allowed to retain his fourth—called by modern writers the 'quarta Trebellianica'—but even where the fourth was deducted, the universal fideicommissarius became a universal successor in respect of the three fourths that were restored to him, the transfer thus operating ipso jure to render him answerable for his share of the debts. Moreover, the universal fideicommissarius had the same right of compulsion as against the heir as he possessed under the SC. Pegasianum, and if he exercised this right, the whole share of the heir was transferred to him. A universal fideicommissum had

§ 104. thus been definitively converted into an indirect mode of heredis institutio resulting in all cases in a universal succession.

§ 2 I. de fideic. her. (2, 23): Cum igitur aliquis scripserit: LUCIUS TITIUS HERES ESTO, poterit adjicere: ROGO TE, LUCI TITI, UT, CUM PRIMUS POSSIS HEREDITATEM MEAM ADIRE, EAM GAJO SEJO REDDAS, RESTITUAS. Potest autem quisque et de parte restituenda heredem rogare, et liberum est, vel pure, vel sub condicione relinquere fideicommissum, vel ex die certo.

Eod. § 3: Restituta autem hereditate, is quidem, qui restituit, nihilominus heres permanet; is vero, qui recipit hereditatem, aliquando heredis, aliquando legatarii loco habebatur. § 4: Et Neronis quidem temporibus, Trebellio Maximo et Annaeo Seneca consulibus, senatusconsultum factum est, quo cautum est, ut, si hereditas ex fideicommissi causa restituta sit, omnes actiones, quae jure civili heredi et in heredem competerent, ei et in eum darentur cui ex fideicommisso restituta esset hereditas. Post quod senatusconsultum praetor utiles actiones ei et in eum qui recipit hereditatem, quasi heredi et in heredem dare coepit.

Eod. § 5: Sed quia heredes scripti, cum aut totam hereditatem, aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum vel minimum lucrum recusabant, atque ob id extinguebantur fideicommissa: postea, Vespasiani Augusti temporibus, Pegaso et Pusione consulibus, senatus censuit, ut ei, qui rogatus esset hereditatem restituere, perinde liceret quartam partem retinere atque lege Falcidia ex legatis retinere conceditur. Ex singulis quoque rebus, quae per fideicommissum relinquuntur, eadem retentio permissa est. Post quod senatusconsultum ipse heres onera hereditaria sustinebat, ille autem, qui ex fideicommisso recipit partem hereditatis, legatarii partiarii loco erat, id est ejus legatarii cui pars bonorum legabatur; quae species legati partitio vocabatur, quia cum herede legatarius partiebatur hereditatem. Unde, quae solebant stipulationes inter heredem et partiarium legatarium interponi, eaedem interponebantur inter eum, qui ex fideicommisso recipit hereditatem, et heredem, id est, ut et lucrum et damnum hereditarium pro rata parte inter eos commune sit. — § 6: Sed, si recuset scriptus heres

adire hereditatem ob id quod dicat eam sibi suspectam esse quasi damnosam, cavetur Pegasiano senatusconsulto, ut, desiderante eo cui restituere rogatus est, jussu praetoris adeat et restituat hereditatem, perindeque ei et in eum, qui recipit hereditatem, actiones dentur, ac si juris est ex Trebelliano senatusconsulto. Quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur et actiones hereditariae ei et in eum transferuntur, qui recipit hereditatem, utroque senatusconsulto in hac specie concurrente. § 104.

Eod. § 7: Sed . . . placuit, exploso senatusconsulto Pegasiano quod postea supervenit, omnem auctoritatem Trebelliano senatusconsulto praestare, ut ex eo fideicommissariae hereditates restituantur, sive habeat heres ex voluntate testatoris quartam, sive plus, sive minus, sive penitus nihil, ut tunc quando vel nihil vel minus quarta apud eum remaneat, liceat ei vel quartam, vel quod deest, ex nostra auctoritate retinere, vel repetere solutum, quasi ex Trebelliano senatusconsulto pro rata portione actionibus tam in heredem quam in fideicommissarium competentibus.

§ 105. *Mortis causa capio.*

Mortis causa capio is a general term for any mode of acquisition which takes effect by virtue of the last wishes of a dead person. It means more particularly a mode of acquisition on death which does not take the form of a succession to an inheritance or of a legacy, as, for example, where a person receives something condicionis implendae causa—a testator, say, instituting Maevius as heir subject to the condition: si Titio decem dederit. § 105.

A mortis causa donatio (sup. p. 138) is likewise a form of mortis causa capio. True, the title to a mortis causa donatio does not commence with the inheritance, but takes effect from the last moment of the *life* of the deceased, and is consequently independent of the aditio of the inheritance. Nevertheless mortis causa donationes are governed, on principle, by the same rules of law as legacies. A mortis causa donatio—even though in excess of the limits imposed on gifts (sup. p. 138)—can be validly effected by

§ 105. means of a codicil, i.e. without the necessity of a judicial insinuatio. It is subject to the deduction of the Falcidian fourth by the instituted heir, and—like a legacy again—it presupposes the solvency of the estate, so that it can only take effect, if sufficient assets remain after deducting the debts.

L. 35 pr. D. de mortis causa don. (39, 6) (PAULUS): Senatus censuit placere mortis causa donationes factas in eos quos lex prohibet capere, in eadem causa haberi, in qua essent, quae testamento his legata essent, quibus capere per legem non liceret.

INDEX.

(The references are to the pages. Figures in the thicker type indicate references to the Latin extracts. The small figures placed in brackets after the larger ones refer to the foot-notes.)

A.

Abdicatio tutelae, 407.
Absolutoria judicia, 68.
Accepti pagina, ratio, 305.
Acceptilatio, extinguishes a correal obligation, 283.
——— *literal*, 307, 342: fell into disuse, 343.
——— *verbal*, nature, form, and object of, 342, 343, 344.
Accessio, 243–245, 247: distinguished from specificatio, 248.
——— possessionis, in usucapio, 241, 254 (1).
Accident, in the law of contract, *see* Casus.
Accrual, between co-heirs, 414: *see also* Jus accrescendi.
Accusatio suspecti tutoris, 407.
Acquisitio hereditatis, 413, 414–420: by heredes domestici, 414–418: by heredes extranei, 418–420.
Acquisition, derivative and original, of ownership, *see* Ownership.
Acquisitiones civiles and naturales, 231, 232: *see* Ownership.
Actio, meaning of, 152, 153, 163: classification of actions, 185–188.
——— *ad exhibendum*, 190.
——— *ad supplendam legitimam*, 467, 468.
——— *arbitraria*, 196.
——— *auctoritatis*, by purchaser in mancipatio, 33 (7), 229.
——— *commodati*, 292: unsatisfactory result of a mere pecuniary condemnation in an, 190.
Actio *communi dividundo*, when employed, 320: an actio mixta, 188.
——— *conducti*, 311, 312.
——— *confessoria*, for the protection of servitudes, 266, 267: unsatisfactory result of a mere pecuniary condemnation in an, 190: *utilis*, can be brought by an emphyteuta, 269.
——— *de arboribus succisis*, 155 (3).
——— *de dolo (doli)*, the appropriate remedy for dolus, 136, 330: object of, 136: only subsidiary, 136, 330: entails infamy on the party condemned, 330: unsatisfactory result of a mere pecuniary condemnation in an, 190.
——— *de effusis vel dejectis*, 331.
——— *de eo quod certo loco*, 196.
——— *de in rem verso*, 336, 339, 340: *utilis*, 338, 339.
——— *de pauperie*, 331: co-owners of an animal that has done damage correal debtors in respect of the, 280 (2).
——— *de peculio*, 335, 336, 339, 340: *see also* 392.
——— *de pecunia constituta*, 322, 323.
——— *de posito vel suspenso*, 331.
——— *de recepto*, 318.
——— *de statu defuncti*, barred in five years, 206 (1).
——— *depositi*, 293: unsatisfactory result of a mere pecuniary condemnation in an, 190: plea of set-off not allowed in, 353, 354.
——— *doli*, *see* Actio *de dolo*.
——— *emti*, 310.
——— *ex interdicto*, 216.
——— *ex stipulatu*, by the creditor in

stipulatio, 302, **304**: for the recovery of dos, 376: differences between the, and the actio rei uxoriae, 376, 377: Justinian's statutory, 378, **379**.
Actio *exercitoria*, 337, **339**.
——— *familiae erciscundae*, when employed, 320, 471: an actio mixta, **188**: legata per praeceptionem enforced by, 474, **476**.
——— *fiduciae*, on a mancipatio fiduciae causa, 36: for what purpose available, 316 (1): what the judex in an, had to determine, 36: an actio bonae fidei, *ibid.*: an actio in factum concepta, 36 (11).
——— *finium regundorum*, when employed, 320: an actio mixta, **188**.
——— *furti*, a penal action, 188, 323, **325**: who can bring an, 324, **325**: concepti, oblati, non exhibiti, and prohibiti, 324.
——— *hypothecaria*, or *quasi Serviana*, 274: introduction of the, 183: unsatisfactory result of a mere pecuniary condemnation in an, 190: *see also* 179, 180.
——— *in factum civilis*, (*in factum*) *praescriptis verbis*, when available, 294, 316: distinguished from an actio in factum, simply, 180 (1): the classical jurists always say *agere* praescriptis verbis, 295 (1).
——— *in rem scripta*, explained, 186, 187.
——— *injuriarum aestimatoria*, 328.
——— *injuriarum noxalis*, 194.
——— *institoria*, 337, **340**.
——— *judicati*, who may bring an, 210: effect of, 211: had to be brought by the successful plaintiff if he wished to effect an execution, 213.
——— *legati*, 478.
——— *legis Aquiliae*, object of, 326, **328**: nature of, 326: effect of defendant in an, denying liability, 326, 327.
——— *locati*, 311, 312: unsatisfactory result of a mere pecuniary condemnation in an, 190.
——— *mandati*, 314.
——— *metus*, *see* **Actio** *quod metus causa*.
——— *negatoria*, a real action, 186: when employed by an owner, 249: *utilis*, can be brought by an emphyteuta, 269.
——— *negotiorum gestorum*, 318, 319.
——— *noxalis* (*noxal action*), master liable to an, for delicts of slave, 331: co-owners of a slave correally liable to an, 280 (2): husband liable to an, for delicts of wife in manu, 369: unsatisfactory operation of a pecuniary condemnation in an, 191: how remedied by the praetor, 194: not as such an actio arbitraria, 197 (6).
Actio *pignoraticia*, 293: unsatisfactory result of a mere pecuniary condemnation in an, 190.
——— *praescriptis verbis*, *see* **Actio** *in factum praescriptis verbis*.
——— *pro socio*, 314.
——— *protutelae*, 406.
——— *Publiciana*, an actio ficticia, 181: a rei vindicatio (utilis), 181: form of the intentio in an, 181: an actio in jus concepta, 182: employed by bonitary owners, 233: intended for the protection of usucapio possessors, 249, 250: but chiefly used for the protection of owners, 251.
——— *Publiciana confessoria*, when available for the protection of servitudes, 267.
——— *Publiciana negatoria*, 250.
——— *quanti minoris*, 310.
——— *quasi institoria*, 338.
——— *quasi Serviana*, *see* **Actio** *hypothecaria*.
——— *quod jussu*, 336.
——— *quod metus causa*, object of, 135, 330: against whom available, 135, **136**: an actio in rem scripta, 186: unsatisfactory result of a mere pecuniary condemnation in an, 190.
——— *rationibus distrahendis*, 406.
——— *redhibitoria*, nature and object of, 310: unsatisfactory result of a mere pecuniary condemnation in an, 190: how remedied by the praetor, 194.
——— *rei uxoriae*, object and nature of, 375, 376: differences between the, and the actio exstipulatu, 376, 377; change in the, by Justinian, 377, 378, **379**.
——— *rerum amotarum*, 371.
——— *rescissoria* or *restitutoria*, 218.
——— *Serviana*, 182, 274.
——— *tributoria*, 336.
——— *tutelae*, 319, 405.
——— *venditi*, 310: de in rem verso, de peculio, and institoria, 338.
——— *vi bonorum raptorum*, 325, **326**.
——— *vindictam spirans*, explained, 329: examples of, 329, 466.

Action by rescript, 221 (2).
Actiones, classification of, 185–188: limitation of, 206, 207.
——— *adjecticiae qualitatis*, why so called, 338: nature of, 338: examples of, **339**, **340**: available against a husband on contracts concluded by a wife in manu, 369.
——— *aediliciae*, 310.
——— *arbitrariae*, explained, 195, **197**, (*and see* 193, 194): formula in, 195: compared with and distinguished from actiones bonae fidei, 196: examples of, 195, **197**.
——— *bonae fidei*, distinguished from actiones stricti juris, 36, 187: first recognized instance of, 36: other instances, 187: the intentio in, incerta, 187: distinguished from actiones arbitrariae, 196: *see also* **Negotia bonae fidei**.
——— *civiles* and *honorariae*, 183.
——— *directae* and *utiles*, 181, 182, 183.
——— *ex contractu* and *ex delicto*, 187, **188**, 287.
——— *famosae*, 128.
——— *ficticiae*, explained and illustrated, 181: by a usucapio possessor, 249, 250: by the assignee of an obligation, 334 (2): by and against a bonorum possessor, 435, **436**.
——— *in factum conceptae*, explained, 180: how employed by the praetor, 180, 183: may be directae or utiles, 182: actiones bonae fidei first used in the shape of, 36 (11).
——— *in jus conceptae*, explained, 179: may be directae or utiles, 180, 181.
——— *in personam* and *in rem*, difference between, explained, 185, 186, 187, **188**: Labeo probably the author of the division of actions into, 65.
——— *mixtae*, 188, 323: *see also* 331.
——— *perpetuae* and *temporales*, 206–208.
——— *poenae* and *rei persequendae causa comparatae*, 188: *see also* 323.
——— *poenales*, 188, 323.
——— *populares*, 188: *see also* 331.
——— *praejudiciales*, 186, **188**: formula in, 189.
——— *privatae*, opposed to actiones populares, 188.
——— *stricti juris*, distinguished from actiones bonae fidei, 36, 187: unjust operation of a mere pecuniary condemnation in, 192, 193: how remedied by the praetor, 194, 195: *see also* **Negotia stricti juris**.
Actus: *see* **Servitus**.
Addictio, an acquisitio civilis, 232: follows a confessio in jure at once, 31.
Aditio hereditatis, meaning of, 427, 428: is required from heredes extranei, 418, but not from heredes domestici, 415: is irrevocable, 419.
Adjudicatio, an acquisitio civilis, 232: a derivative mode of acquisition, 236, 237: a mode of acquiring servitudes, 265: in what actions it occurs, 320.
Administrative Law, a branch of public law, 16.
——— **Procedure**, the procedure extra ordinem an, 213.
Adnotare, meaning of, 455 (8).
Adnumerare, meaning of, 228 (1a).
Adoptio (Datio in adoptionem), a mode of acquiring patria potestas, 357, 385, 386: two kinds of adoption, **Arrogatio** (q. v.) and adoptio, in the narrower sense, 386, **389**: adoptio originally a public act, 387, 450 (3): the private juristic act due to the interpretatio, 32, 387: involves capitis deminutio minima, 124, 125: how transacted, 387, 388: simplification by the law of the later empire, 388: effect of, under Justinian, according as it was plena or minus plena, 388: rights of succession of adoptive children under the Praetorian Edict, 440 (*see also* 438), under the 118th Novel, 443: women cannot adopt, 388: wills originate in adoption, *see* **Wills**.
Adoptive children, rights of succession of, *see* **Adoptio**.
Adpromissor, 304.
Adscribere, meaning of, 455 (8).
Adstipulatio, Adstipulator, 303, **304**: provision concerning, in the lex Aquilia, 326 (4).
Adventicia, *see* **Bona adventicia; Dos**.
Adversaria, 308 (1).
Aedes vectigales, 268.
Aediles, Curule, Edict of the, 56: actions introduced by the (aedilician actions), 310.
Aelius, Sextus, 59, 60, **62**.
Aerarium (Treasury), as a subject of proprietary rights, 102: caducorum vindicatio by, 385.
Aeris confessus, in the position of a judgment-debtor, 158.

Aes et libra, *see* **Mancipatio**; **Nexum.**
Affinity, what it is, 358.
Affirmatores, 405.
Africanus, *see* **Caecilius.**
Agency, a form of **Representation** (q. v.), 145: limited use of, in Roman law, 145: secret agency, 146: processual agency, 332, 333: liability of principal on contracts of agent, 337, 338: husband the agent of wife in respect of the management of her property, 370: *see also* **Mandatum.**
Ager vectigalis, distinguished from emphyteusis, 268 (1): subsequently identified, *ibid.*
Agere cum compensatione, bankers must, 351 (8).
——— **cum deductione**, bonorum emtor must, 351: distinguished from agere cum compensatione, 351 (8).
——— **lege**, meaning of, 152: *see* **Legis Actio.**
——— **per formulam**, *see* **Formula.**
——— **per sponsionem**, *see* **Sponsio.**
——— **praescriptis verbis**, *see* **Actio** *in factum civilis.*
Agnati, Agnatic Family, Agnatio: defined, 124, 356, **358**: who are, and who are not, agnati, 356: agnatio contrasted with cognatio, 357, **358**: gradual supersession of the agnatic by the cognatic principle, 357, 442, 443: an agnatic family can be changed, 124: a change of agnatio involves capitis deminutio minima, 124, 125.
Guardianship by agnati, *see* **Guardianship.**
Rights of agnati to intestate succession, by the civil law, 437, **438**: by the praetorian law, 438, 439, 440.
In jure cessio hereditatis by an agnatus, *see* **Cessio, in jure.**
Agnitio (bonorum possessionis), 434.
Agreement, as one of the 'elements of law,' 20: definition of, 132: a **Contract** (q. v.) a species of agreement, 132: narrow conception of an agreement (pactio) in Roman law, 132 (1).
Alaric II, Code of, 92.
Album praetorium, 49 (2), 50.
Alienation, of fundus dotalis by husband forbidden, 374: of property of ward, 403, **404**: by impuberes and women, *see* **Tutela** *impuberum, mulierum.*
Alieni juris, homo, 120.
Aliens, 39 ff., 116 ff.; *see* **Peregrini.**
Alluvio, 244.
Alterum tantum, arrears of interest not recoverable beyond, 298.
Alveus derelictus, 244.
Analogy, method of, in Jurisprudence, 20, 21.
Anastasius, enactment on the rights of succession of emancipati, 442.
Anatocismus, forbidden, 298.
Anefang, 161 (15).
Anfertigung, 427 (4).
Animals, wild, are res nullius, 227, 237.
Animus domini (**rem sibi habendi**), an element of juristic possession, 253.
——— **novandi**, necessary to effect a novatio, 346, **347.**
Annus utilis, explained, 207: what actions had to be brought within an, 206.
Antichresis, 276.
Antoninus Pius, constitutio on slaves, 109: as to the right of divorce by a father, 368 (2): oratio on donationes mortis causa between husbands and wives, **372**: as to arrogatio of impuberes (quarta divi Pii), 386: rescript protecting bonorum possessio secundum tabulas, 455, **456.**
Apostates, cannot become heirs, 472.
Appeals, system of, development of, 151 (5), 224.
Appointment of Guardians: 399–403: *see* **Guardians.**
Aquae ductus, *see* **Servitus.**
Aquiliana stipulatio, 343, **344.**
Aquilius Gallus, formula by, for instituting certain postumi, 463.
Arbitratus, 193, 194, 195.
Arbitrium, explained, 193: proceedings subsequent to the pronouncement of an, 194, 195: *see also* **Actiones** *arbitrariae.*
Arcadius and Honorius, abolish cretio, 419.
Archon, Basileus, his administration of the 'royal laws' in Attica, 28 (2): order of admittance by archon to heirs other than sui in Attic law, 426.
Argentarii (Bankers), codex rationum mensae of, 305: must sue cum compensatione, 351 (8): argentarii socii correally liable for partnership debts, 280 (2).
Arrogatio, a form of adoption, 386, **389**: how transacted, 386: of impuberes, 386, 387, **389**: effect of, on the contractual debts of the arrogatus,

387 (2): effect of, not changed by Justinian, 388: produces capitis deminutio minima, 124, 125.
As, the copper, the first coin used in Rome, 25.
Assignatio, of ager publicus, 232.
Assignment, of obligations, 332–335: recognized by the praetorian law, 334: of an hereditas, 418 (3).
Attic law, law of succession in the, 425, 426.
Auctor, meaning of, 234.
Auctoritas, principis, explained, 63: tutoris, *see next word*: of vendor, 33 (7), 229.
Auctoritatis interpositio, what it is, 395, **399**, 404: enables impuberes to act themselves, 142: when compellable, 398: distinguished from gestio, 404.
Augustus, orders responsa to be given ex auctoritate principis, 63, **64**: laws of, on the restoration of dos, 376: marriage legislation of, 384: establishes the rights of filiifamilias in respect of peculium castrense, 391: establishes a cognitio extraordinaria for fideicommissa, 477.
Austrian Civil Code, the, 4, 5.
Authenticum, the, 14, 91.
Avulsio, 244.

B.

Baden Landrecht, the, 4.
Bailment, 292: *see* **Depositum.**
Bankers, *see* **Argentarii.**
Bankruptcy proceedings, in respect of a wife's antenuptial property, 369: in respect of the property of an arrogatus, 387 (2): a slave as heres necessarius must submit to, 417: *see also* **Execution; Bonorum emtor.**
Beneficium abstinendi, 416.
——— **competentiae**, 211.
——— **divisionis**, 283, 299 (2).
——— **excussionis sive ordinis**, 299.
——— **inventarii**, 469.
——— **separationis**, 469.
Bequests, 473 ff.: divided (before Justinian) into **Legata** (q. v.), 473–476, and **Fideicommissa** (q. v.), 476–478: assimilation of legata and fideicommissa by Justinian, 478, 479: all bequests recoverable by actio legati, 478: restrictions on, 479, 480.
Besses usurae, 298.
Binubus, *see* **Parens binubus.**
Blind persons, wills of, 457: cannot witness a will, 456 (9).
Bluhme, on the compilation of the Digest, 88 (5).
Bona adventicia, defined, 121, 392: rights of father in regard to, 392: property devolving from a filiusfamilias to his children under the 118th Novel reckoned as, 446.
——— **adventicia irregularia**, defined, 392.
——— **castrensia** (**peculium castrense**): defined, 121, 391, **393**: rights of filiusfamilias in respect of, 391: devolution of, 391, altered by the 118th Novel, 446: compared with bona adventicia, 392.
——— **ereptoria**, 472.
——— **materna**, 392.
——— **materni generis**, 392.
——— **paraphernalia**, 370.
——— **quasi castrensia** (**peculium quasi castrense**), defined, 121, 391: governed by same rules as **Bona castrensia** (q. v.), 392.
——— **vacantia**, 421.
——— **vi rapta**, 325.
Bona fide serviens, who is a, 115.
Bona fides, genius of Roman jurists in discovering the requirements of, in human dealings, 73, 74: in bilateral contracts, 137, 138: in usucapio, 241: *see also* **Negotia bonae fidei.**
Bonae fidei possessor, who is, 246: his position in respect of fructus, 246, 249 (1): has juristic possession, 253.
Bondage, of debtors, *see* **Execution.**
Bonitary ownership, opposed to quiritary ownership, 233: distinction abolished by Justinian, *ibid.*: protected by the actio Publiciana, 233, 251.
Bonorum cessio, 211: *see* **Execution.**
——— **emtor**, who was, 211: must sue cum deductione, 351: sale to, of an unclaimed estate, 438.
——— **possessio**, opposed to hereditas as a form of hereditary succession, 423, 434, till Justinian, 446: theories as to the origin of, 423–425: probable true view, 425–433: original object of, 432: the edict on, in Cicero's time, 425 (1), contained a general clause by which the praetor reserved power to grant bonorum possessio at his discretion, 433: how, developed into an independent system of succession, 433: could only

be acquired by a judicial act, 434: within what time, had to be applied for, 434: (*and see* 207 (2)): remedies for the protection of, 434, 435, **436**: edictalis and decretalis, 434: employed either juris civilis adjuvandi, or corrigendi, or supplendi gratia, 424, 435: was either cum re or sine re, 435: delatio of, takes place on three grounds, 435:
(1) *ab intestato*, 438–441: four classes, unde liberi, 438, 439: unde legitimi, 439, 440: unde cognati, 440, 441: unde vir et uxor, 441.
(2) *secundum tabulas*, 454, 455.
(3) *contra tabulas*, on account of praeteritio, 464, 465.

Bonorum venditio, *see* **Bonorum emtor**; **Execution**.

Booty of war, addictio of, 232: *see also* 238.

Bounty, **promise of**, 322.

Breviarium Alarici, 92, 93, 94.

Brevi manu traditio, 234.

C.

Caducorum vindicatio, 385.

Caecilius Africanus, 69.

Caelibes, cannot take under a will, 385, 472, unless they marry within a hundred days, 434 (14): their incapacity not known in Justinian's law, 472.

Canon, emphyteuta must pay a, 269.

Canon Law, 4, 7.

Capacity of action, 140–143, in the wider and narrower sense, 140: three degrees of, 141: puberes minores XXV annis have full capacity, 142: distinguished from proprietary and delictual capacity, 143.

Capitis deminutio, 122–126: defined, 122: three degrees of, *ibid.*: maxima, 122, 123: media, 123: minima, 124–126, 366: effect of, on contractual debts of the capite minutus, 125, 354: effect of, on personal servitudes, 125, 265, 266 (*see* 261): effect of, on patria potestas, 393: effect of, on guardianship, 406.

Capito, C. Atejus, 64, 65, **75**.

Captivity, a Roman civis in, 122, 123.

Caracalla, confers the Roman civitas on all citizens of the Empire, 81, 117, 70 (10), including Latini coloniarii, 119, but excluding dediticii, 117.

Cassiani, 65.

Cassius Longinus, 65.

Casus, explained, 287: debtors not liable for, 287, 347, unless in mora solvendi, 287.

Cato, M. Porcius, 61.

Catoniana regula, stated, 61 (2a).

Caupones, 318, 331.

Causa civilis, a necessary ingredient in a Roman contract, 288.

——— **falsa**, non nocet: explained, 135, 137.

——— **justa**, traditionis, 235.

——— **lucrativa**, 346, **347**.

——— **omnis** (accessions, &c.), 249.

——— **perpetua**, in real servitudes, 262.

Causae cognitio, by the praetor in the extraordinary procedure, 212, 218: on the arrogatio of an impubes, **389**.

Cautio *rei uxoriae*, 375.

——— *rem pupilli salvam fore*, 405.

——— *usuaria*, 260.

——— *usufructuaria*, 260.

Cavere, part of the business of a Roman jurist, 62.

Celibacy, *see* **Caelibes**.

Celsus, P. Juventius, 68, 69.

Censor, reprimand from the, causes existimationis minutio, 127, and checks abuse of patria potestas, 389.

Centesimae usurae, 298.

Centumviri, the court of, tried vindicationes during the Republic, 150 (3): were private persons, *ibid.*: the legis actio procedure survived in the court of, down to Diocletian, 171: probable explanation of this fact, *ibid.*

Cessio actionis, or assignment of an obligation, *see* **Assignment**.

Cessio bonorum, 211: *see* **Execution**.

Cessio, in jure, development of, by the interpretatio, 30, 31: for what purposes employed, 31 (4): manumission by, 110: cannot be used by a filiusfamilias, 120 (1): an example of the voluntary jurisdiction, 172: an acquisitio civilis, 232.

——— *fiduciae causa*, 37 (12), 316 (1).

——— *hereditatis*, by a heres legitimus, 418 (3).

——— *servitutis*, 263.

——— *tutelae legitimae mulierum*, 32 (4), 398 (2).

Childlessness, 385.

Children, status of, if mother a slave, 109: not born in wedlock, 358: mutual rights of succession between mother and, 442.

Citations, Law of, 84, 85, 88 (5).
Civic honour, *see* **Existimatio.**
Civil codes, 4.
——— **modes of acquisition**, *see* **Ownership.**
——— **procedure**, *see* **Roman civil procedure.**
Civis, Civitas, civis defined, 116: cives and peregrini, 116, 117: the Roman civitas conferred on all Italian communities, 118, on all citizens of the Empire, 117, 119: loss of civitas is capitis deminutio media, 122, 123: effect of infamy on, 128: distinction between cives and non-cives abolished by Justinian, 119.
Classical jurisprudence, 68 ff.: *see* **Jurisprudence**, *Roman.*
Claudius, *see* **Lex** *Claudia.*
Clausula Juliani, 439 (2), 441 (3).
Clientes, 115.
Code, Justinian's, 9, 90: MSS. of, 13.
Codex, meaning of the word, 84 (1).
——— *accepti et expensi*, 306, 308 (1).
——— *Gregorianus and Hermogenianus*, 86, 90, 94.
——— *Justinianeus*, *see* **Code.**
——— *rationum*, 305, 306, 308 (1).
——— *repetitae praelectionis*, 90.
——— *Theodosianus*, 86, 90, 94.
Codicilli, 478, 479: appointment of testamentary guardian by, 400: fideicommissa usually created by, 477.
Codification of Roman law, 82 ff.
Coëmtio (matrimonii causa), a mode of creating manus, 359, 360: ceremony of, **365**: a strict marriage (*see* **Marriage**), 363: effect of, on wife's property, *see* **Husband and Wife**: how dissolved, 381: disappears in the Empire, 363.
——— *fiduciae causa* (*coëmtionator*), 37 (12), 398 (2).
Cognati, Cognatic Family, Cognatio: defined and distinguished from agnati, etc., 357: cognatic family cannot be changed, 124: gradual supersession of the agnatic by the cognatic principle, 357, 442, 443: statutory guardianship of cognati under Justinian, 400: the cognati of the praetorian edict, 440, 441: degrees of cognati, 440.
Cognitio causae, *see* **Causae cognitio.**
Cognitio, the procedure extra ordinem a procedure by, 212.
Co-heirs, solidary liability of, 411: accrual between, 414: operation of the vesting of an inheritance as against, 471: degree of care required of, 320: *and see* **Communio.**
Coined money, *see* **Money.**
Collateral relations, who are, 358: of the whole blood and the half blood, *ibid.*: the former preferred to the latter in Justinian's scheme of succession, 444.
Collatio bonorum, 439.
Collective principle, the, in common rights and duties, 281 (4).
Colleges, of judges, 150 (3).
Collegia, as juristic persons, 102, 103.
Coloni, 115.
Colonia Italica, defined, 118 (2).
——— **Latina**, *see* **Latini.**
Comitia calata, wills made in the, 449.
——— **curiata**, arrogationes required the sanction of, 386, originally all adoptions required the sanction of, 387.
——— **tributa**, and the centumviri, 150 (3).
Commercial treaties, 40: *and see* **Commercium.**
Commercium, jus commercii, what it is, 116, **119**: an element of the civitas Romana, 40: granted to certain peregrini by express treaty, 40 (*and see* 166): grants of, rare after the third century B. C., 41: (*see also* **Peregrini**): liberti have, 112: filiifamilias have, 120: testamenti factio passiva is part of, 449.
Commodatum, nature of, 292: a real contract, 290, 292: distinguished from mutuum, **296.**
Common boundaries, common inheritance, *see* **Communio.**
——— **law of Germany**, the, 3, 5, 17.
——— **ownership**, a thing held in, divided into ideal parts, 228: *and see* **Communio.**
Communio, what it is, 319: mutual rights of co-proprietors, 319, 320: three kinds of, 320, corresponding to which there are three judicia divisoria, *ibid.*: *see also* 236, 237.
Compensatio (**set-off**), 348–354: how far recognized by the jus civile, 348, 349: the praetor grants an exceptio doli on the ground of a proper counter-claim, 349: effect of this exceptio, 350: altered by Marcus Aurelius, *ibid.*: anomalous nature of such an exceptio, 350, 351: two views as to the effect of, 352: the Roman

principle 'ipso jure compensari' explained, 352, 353: Justinian's changes in the law of, 353: distinguished from deductio, 351 (8).
Complex relationship, what is, 358.
Compromise, pleaded as a defence, 198: must be enforced by suing praescriptis verbis, 295 (1).
Concubinatus, 364, **365**.
Concursus causarum lucrativarum, 345, **347**.
Condemnatio, 189–197: as part of the formula, 179, 189: its gist lay in a money payment, 189: unfair operation of a pecuniary condemnatio illustrated, 189–193: how remedied by the praetor, 193–195: effect of an exceptio doli for enforcing a counterclaim on the, 351.
Condicio *in praesens vel praeteritum relata*, 139, **140**.
——— *juris*, 427 (7).
——— *potestativa*, 463: *and see* **Condition**.
Condictio, a **Legis actio** (q. v.), 155: literal meaning of, 157: when an actio stricti juris is called a, 187: on mutuum, 291: on stipulatio, 302: on a literal contract, 307.
——— *causa data causa non secuta*, 316, **318**.
——— *certi* and *incerti*, 302 (*and see* 291).
——— *ex injusta causa*, 317, **318**.
——— *furtiva*, a reparatory action, 188: object of, 317: who may bring a, 324.
——— *indebiti*, on a solutio indebiti. 315, **318**: not available to recover money paid under a natural obligation, 321.
——— *ob causam datorum*, 316.
——— *ob turpem causam*, 317, **318**.
——— *propter poenitentiam*, 316 (1).
——— *sine causa*, 316.
——— *triticaria*, 302.
Condition, defined, 139, **140**: a suus cannot be effectually instituted or disinherited on a, 463.
——— *immoral*, in a will, 459.
——— *impossible*, 139: in a will, 459, **460**.
———, *necessary*, 139.
———, *resolutive*, 139: no institution subject to a, 459, except through a universal fideicommissum, 483.
——— *suspensive*, 139: in a will, 459. *See also* **Condicio**.
Condominium, partition of, *see* **Adjudicatio; Communio**.
Conducere, literal meaning of, 312 (1).
Conductio, *see* **Locatio conductio**.
——— **perpetua**, distinguished from emphyteusis, 268 (1).
Confarreatio, marriage by, 360: ceremony of, **365**: how dissolved, 381.
Confessus pro judicato est, 30, 31.
Confirmatio, of tutor by magistrate, when necessary, 400.
Confusio, a mode of extinguishing servitudes, 266, and obligations, 347: *see also* 469.
——— **bonorum**, 469.
Connubium, jus connubii, what it is, 116, **119**, 360: Latini have, 118, except Latini Juniani, *ibid.*: liberti have, 112, and filiifamilias, 120: restricted by infamy, 128.
Consanguinei, who are, 358.
Consensual contracts, 309–315: meaning of the name, 288, 290, 309: development of, 291: enumerated, 309: how extinguished, 343.
Consensus, an element of an agreement, 132.
——— **facit nuptias**, 363.
——— **nuptialis and sponsalicius**, 364.
Consilium, the legal advisers of the magistrate, 114: *see also the* **Lex Atilia**.
Consobrini, who are, 440.
Constantine, the imperial power becomes monarchical from, 76: introduces manumissio in ecclesia, 111: declares a **Lex commissoria** (q. v.) void, 276: abolishes the penalties on celibacy and childlessness, 385: tendency of the legislation of, and later emperors in regard to filiifamilias, 392: enacts that legata shall be valid without solennia verba, 478.
Constitutional Law, a branch of public law, 16.
Constitutiones, defined, 77, 78: constitutio generalis and personalis, distinguished, 79; generales, Justinian on, 80 (7): generales, the true type of the imperial law, 86.
Constitutum debiti, 322: two kinds of, *ibid.*
——— **possessorium**, 234.
Consumable things, 227.
Consumption of a right of action, produced by **Litis contestatio** (q.v.), 163, 208: by the formula, when, 175.

Consumtio existimationis, 126.
Continuatio dominii, in the case of sui heredes, **416** : *and see* 412.
Contract, defined, 132 : restricted sense of, in Roman law, 288 : oldest forms of, originate in pledges, 38 ([13]) : contracts in the old law, 288–290 : four classes of contracts, 288 : liability on a, made by another, 335–340 ; contracts by slaves, 108, 335–337 : by filiifamilias, 120, 337 : effect of arrogatio on, 387 ([2]) : of capitis deminutio, 125, 354 : *and see* **Agreement ; Obligation.**
Contractus emphyteuticarius, 269.
Contraria voluntas (**mutuus dissensus**), extinguishes an obligation contracted consensu, 343.
Contrarius actus, a mode of extinguishing obligations ipso jure, 341–344 : application of the principle in the law of marriage, 381 : in the old law of inheritance, 431.
Contubernium, 364, **365**.
Conventio in manum, 124 : involves capitis deminutio minima, 125 : *and see* **Marriage** (with manus).
Corporations, as juristic persons, 101, 103.
Corpus juris civilis, as a source of Roman law, 8–10 : MSS. of, 11–14 : sums up the results of the whole development of Roman law, 81 : compilation of the, 87–91.
Corpus juris canonici, 4.
Correal obligation, Correality, 279 ff. : examples of, 279, 280 : defined, 280, 281 : usual means of creating, in Rome, 279 ([1]) : the correal and the collective principle distinguished, 281 ([4]) : correality admits of modifications, *ibid.* : difference between correality and solidarity explained, 281, 282 : illustrated by the rules on the extinction of each, 282, 283 : the principle of correality broken in upon, 283 : importance of the distinction between correality and solidarity, 284 : correality produced by adstipulatio and adpromissio, 304 : a correal creditor distinguished from a solutionis causa adjectus, 345 ([3]).
Counter-claim, *see* **Compensatio.**
Credit, transactions based on, developed by the interpretatio, 37 : how personal, is rendered possible, 413.
Creditors, remedies of, in the legis actio procedure, 161 ; the interests of the, supplied the guiding principle of the Roman law of inheritance, 412 : *and see* **Obligation.**
Cretio, defined, **419**, **420**, 428 : how made, 427 : always required from heredes extranei in the old law, 427, 429 : no limit of time in the old law, 431 : obscuring of the original conception of, 433 : when required from heredes extranei in the classical law, 418, **419** : literal meaning of the word, 428 ([9]) : cretio vulgaris and continua, **420** : abolition of, 419, **420**.
Criminal Law, a branch of public law, 16.
Culpa, levis and lata, 287 : *see* **Diligentia.**
Cura, Curator : cura a form of **Guardianship** (q. v.), 395 : distinguished from tutela, 395, 396 : three cases of, 396 : cura minorum, 142, 143, 397 : effect of the cura on the minor, *ibid.* : cura legitima over furiosi and prodigi (xii Tables), 399 : granted to the nearest agnates or gentiles, 401 : special cases of curae, 399 : the magistrate appoints curators, 401.
Customary law, nature and origin of, 16 : objection of the Romans to, 28, **29** : the magistrate not absolutely bound by, 28, 58 : otherwise the judex, 151 ([4]).

D.

Damage, to property in general, *see* **Dolus** : to corporeal property, *see* **Damnum injuria datum.**
Damages, measure of, under the Lex Aquilia, 326.
Damnum infectum, pignoris capio perhaps used in case of, 160 : the legis actio survived in proceedings concerning, 172 ([9]).
Damnum injuria datum (lex Aquilia), explained, and the application of the statute illustrated, 326–328.
Dare, meaning of, as the object of an obligation, 285.
——— **ex injusta causa**, 317.
——— **ob causam**, 315, 316.
——— **ob turpem causam**, 317.
Datio in adoptionem, *see* **Adoptio.**
——— **in solutum**, 345.
Decemviri, *see* **Twelve Tables.**
——— **stlitibus judicandis**, tried questions concerning liberty, 150 ([3]) : abolished by Augustus, 172 ([8]).

Decreta principis, 76.
Decretum, distinguished from sententia in Roman procedure, 151: decretum further explained, 212, 213: the distinction between sententia and decretum not known in the later procedure, 222.
——— **divi Marci**, *see* **Marcus Aurelius.**
Decuriones, 118 (2).
Dediticii, who are, 40, **119**: disabilities of, 114: certain slaves on manumission become, 114: not included in Caracalla's grant of the franchise, 117: enactment concerning the devolution of property of, 55 (10): cease to exist under Justinian, 119.
Deductio, distinguished from compensatio, 351 (8).
——— (**exagoge**), by a suus heres, 426.
——— **in domum**, 364.
——— **servitutis**, 263 (1).
Defences, operating ipso jure and ope exceptionis, 197, 198.
Defensor, meaning of, 390.
Degrees of relationship, 358.
Delatio *hereditatis*, what it is, 413: modes of determining the person to whom, shall be made, 413, 414.
——— *bonorum possessionis*, 435.
Delegation, what it is, 300, 301 (3): when, results in novation, 301 (4).
Deliberation, period of, 419.
Delicts, opposed to contracts, 287: private, what are, 323: obligations arising from, 323 ff.
Delictual capacity, defined and distinguished from capacity of action, 143.
Demonstratio (part of the formula), in bonae fidei actions the intentio opens with a, 187: use of, in the actio in factum civilis, 180 (1), 294.
Denarius, a silver coin, when introduced, 25.
Depositum, 292, 293: *see also* **Actio** *depositi*.
Derelictio, 237.
Derivative acquisition, 234–237: *see* **Ownership.**
Detention, distinguished from possession, 252.
Dharma, 15 (2).
Dies, defined, 140: the institution of an heir cannot be made subject to a, 459, except through a universal fideicommissum, 483.
——— **fasti and nefasti**, 59.
Dies legati venit, 235.
——— **utiles**, *see* **Tempus utile.**
Diffarreatio, 381, **383.**
Digest (**Pandects**), the, of Justinian, 9: compilation of, 88, 89: MSS. of, 11–13.
Digestum infortiatum, novum, vetus, 12.
Dilatory exceptiones, 204.
Diligentia, what degree of, required in negotia bonae fidei, 286, 287: instances where omnis diligentia is required, 246 (bonae fidei possessor), 292 (commodatarius), 293 (pignus), 310 (vendor), 312 (locatio conductio), 314 (mandatarius), 318 (negotiorum gestor): instances where the diligentia quam suis rebus etc. is required, 313 (socius), 319, 405 (guardian), 374 (husband).
Diocletian, grants of the jus respondendi occur under, 72 (11), but after, only the emperor gives authoritative responsa, 83: with, the imperial power becomes monarchical and the administration bureaucratic, 76, 220: from, the development of the law is controlled by the emperor, 78: on the delegation of causes to a judex pedaneus by provincial governors, 222: rescript on laesio enormis, 310.
Disinherison, *see* **Exheredatio.**
Disposition, power of, a minor pubes under cura has no, 142, 143, 397: how far filiifamilias had a, 392: husband's, in respect of res dotales, 374.
Dissensus, mutuus, extinguishes an obligation contracted consensu, 343.
Distraint, 159: *see* **Pignoris capio.**
Divisible things, 228.
Divorce, when a formal act, 381, 382: when informal, 382: two forms of, in free marriages, *ibid.*: checks on, 383: *and see* **Dos.**
Do ut des, do ut facias, 294, **296.**
Doli capax, a person who is, has delictual capacity, 143.
Dolus, defined, 329; effect of, 329, 330: liability for, and culpa distinguished, 330: does not affect the validity of juristic acts by civil law, 136: praetorian remedies for, *see* **Actio** *de dolo*: liability of parties to a negotium bonae fidei not often confined to, 287 (*see* 292, 293).
——— **malus**, definition of, due to Labeo, 65.

Domestic power, agnati are those subject to the same, 124.
Dominica potestas, 109 : *see* **Slave.**
Dominium ex jure Quiritium, how acquired, 232 : to what things it relates, *ibid.* : distinguished from in bonis esse, 233 : abolished by Justinian, *ibid.*
Dominus litis, how a procurator becomes, 332, 333.
——— **negotii**, in representation, 145 : nature of the liability of, *see* **Contract.**
Donatio (inter vivos), defined, 138, **139** : rules concerning, in Justinian's law, 138 : necessity of insinuatio if, exceeds 500 solidi, 138, 322.
——— **inter virum et uxorem**, is void, 138, 371, **372**, but may 'convalesce,' 371.
——— **mortis causa**, defined, 138, **139** : governed by the law applicable to legacies, *ibid.*, 485, 486 : a form of mortis causa capio, 485 : valid as between husband and wife, 371 ([1]), **372.**
——— **propter nuptias**, nature, object and development of, 380, 381 : as a check on divorce, 383.
Dorotheus, 87.
Dos, 372 ff. : object and nature of, 372 : who can demand a, 373 : adventicia, 373, **379** ; profecticia, *ibid.* ; recepticia, 373 : how, may be constituted, 373 : husband's rights in regard to, 374 : husband's duty to restore, after the wife's death, *ibid.* : history of the right of the wife to recover the, 375–378 : husband's rights of retainer in respect of, 375, 376, 378 : wife's right to recover the, how protected in Justinian's law, 378.
Dotalis fundus, 374.
Dotis datio, dictio, promissio, 373.
Ductio, of a child by its father, 390.
Dumb persons, cannot witness a will, 456 ([9]).
Duplicatio, in pleading, 204.

E.

Ecclesiastical law, a branch of public law, 16.
Edict of the Praetor, the, defined, 48 : original nature of, 49, 50 : not a statute nor at first even a source of law, 51 : the formulary procedure brings legal procedure under the control of the praetor, 52 : growth of the praetorian law by means of the edict, 53 : its chief function, 54 : decline of the importance of the, 55 : consolidation of the edicts by Salvius Julianus, 56 (*and see* 220) : contents of the, illustrated, **58.**
Edicta principum, 76, 77.
Edictum *de conjungendis cum emancipato liberis*, 439.
——— *Hadrianum* (*Julianum*), arrangement of the, 49 ([2]), 50 ([3]) : compilation of the, 56 : the contents of the, belong to public law, 56 ([13]) (*and see* 200).
——— *novum*, 51.
——— *perpetuum*, 51.
——— *provinciale*, consolidated, 56 : contents of, corresponded with those of the urban edicts, 56 ([12]).
——— *successorium*, 441.
——— *Theodorici*, 92.
——— *tralaticium*, 51.
Emancipatio, developed by the interpretatio, 32 : produced capitis deminutio minima, 125, 394 : extinguished patria potestas, 393 : how transacted, 393, 394 : change in the later empire, 394 : child's consent to, not required, 394 : Anastasiana, Justiniana, Saxonica, 394.
Emancipatus, succession to an, by civil law, 438 : rights of succession of, by praetorian law, 438, 439, 440, according to the 118th Novel, 443 : rights of succession by necessity of, by praetorian law, 464, under the 115th Novel, 467.
Emblemata Triboniani, 89.
Emphyteusis, 268–270 : distinguished from servitudes, 270.
Emtio venditio, 309–311 : distinguished from exchange, 309.
Enrichment *ex injusta causa*, 317, 318.
——— *sine causa*, explained and illustrated, 315–317.
Ephemeris, 308 ([1]).
Epistola, a form of rescript, 76.
——— *divi Hadriani*, 77 ([2]), 299.
Epitome Juliani, 13.
Equity, and Law, 18 : development of, in Rome, 46.
Ereption, *see* **Bona ereptoria.**
Error, in substantia, explained, 136 : distinguished from error in corpore, 137 : the former only affects the validity of juristic acts in exceptional cases, *ibid.*, where it operates ipso

jure, 137, 138: a ground of in integrum restitutio, 219: payment by, *see* **Solutio indebiti.**

Esse in libertate, meaning of, 115.

Eviction, right of, 270: vendor bound to warrant purchaser against, 310.

Exagoge, 426.

Exceptio, 197–205: meaning of, 197: defences operating ope exceptionis and ipso jure, 197, 198: gives expression to the opposition between the praetorian and civil law, 198, 199: 'civil' exceptiones, operation of, 199, 200: operation of an, in actiones in factum conceptae, 201: place of exceptiones in the Edictum Hadrianum, 49 (2): modes of extinguishing obligations operating ipso jure and ope exceptionis, 340.

——— *civilis*, 200.

——— *dilatoria* and *peremtoria*, 204, 205.

——— *doli*, a special defence to what actions, 136, 198: form of, 202: generalis and specialis, 202, 203: for what purposes employed, 203, 204: anomalous operation of, when used to give effect to a counter-claim, 350, 351.

——— *divisionis*, 283: *see* **Beneficium divisionis.**

——— *dominii*, 250, 267.

——— *jurisjurandi*, 198.

——— *legis Cinciae*, 199.

——— *legis Plaetoriae*, 200.

——— *metus*, 136, 198.

——— *ne praejudicium hereditati fiat*, 470 (1).

——— *pacti de non petendo*, 198, 348.

——— *praejudicii*, 470.

——— *quod metus causa*, *see* **Exceptio** *metus.*

——— *rei judicatae vel in judicium deductae*, when necessary, in the formulary procedure, to prevent a rehearing of the same action, 175, 209: positive and negative function of, 209 (1), 210: when judgment obtained against one correus could be pleaded by or against the other correi, 284.

——— *rei venditae et traditae*, 232.

——— *SCi Macedoniani*, 200, 292.

——— *SCi Vellejani*, 199, 300.

——— *solutionis*, 201.

——— *transactionis*, 198.

——— *vitiosae possessionis*, 256.

Exchange, an innominate real contract, 294, 316: distinguished from sale, 309.

Excusationes, of guardians, 402, **403**, 406.

Execution, extreme rigour of, in the early law (manus injectio), 27, 289: provision of the XII Tables concerning, 27: gave rise to the L. A. per manus injectionem, 157, 158: judicial execution, explained, 157: when available, 158, 189, 193: how effective execution was secured in actiones arbitrariae, 194: always personal in the early law, 210, 289: real execution (missio in bona) first granted by the praetor, 211: proceedings in a missio in bona (venditio bonorum), 211: praetorian execution goes against the debtor's entire estate, *ibid.*, and entails infamy, *ibid.*: effect of cessio bonorum in regard to execution, *ibid.*: introduction by the praetor of a special execution (pignus in causa judicati captum), 212: execution manu militari, 212, 213: in the later empire, 223, 224.

Exercitor, 337, **339**.

Exheredatio, rules of, in the civil law, 462–464: in the praetorian law, 464, 465: under Justinian, 467: nominatim and inter ceteros, 462, 463, 464: of postumi, 464.

Existimatio, meaning of, 126: loss of (existimationis minutio), occurs when, 127: two forms of existimationis minutio, 128: effect of loss of, 128, 129: *and see* **Infamia.**

Expensi pagina, ratio, 305.

Expensilatio, creates an obligatio stricti juris, 290: is the entry, not of a fact, but of an obligation, 306: is extinguished by acceptilatio, 307: *and see* **Literal contract.**

Expromissio, 300.

Extinction of obligations, 340 ff.: *see* **Obligation.**

Extraordinary prescription (usucapio), 242: *see* **Usucapio.**

——— **procedure**, nature of the, 212: contrasted with the ordinary procedure, 213: what matters dealt with by the, 213: becomes formally the ordinary procedure, 223.

F.

Facere, meaning of, as the object of an obligation, 285.

Facio ut des, ut facias, 294, **296**.

Falsa causa non nocet, 135, 137.
Familiae emtor, in the testamentum per aes et libram, function of the, 450: is formal owner of the estate, 451: becomes a mere witness, 452, 454, 455: no one in the power of the, could formerly witness the will, 458.
Family, conception of, in the jus civile, 356: in the jus gentium, 357: constituent members of the, 358, 359.
——— **law of**, 355 ff.: place of the, in the legal system, 99: applied and pure, 99, 355 (*and see* 16).
——— **power**, rigour of the, in the early civil law, 27.
Fas, 15 (2).
Ferruminatio, 247.
Fictio legis Corneliae, 123.
Fictions, use of, in Roman civil procedure, *see* **Actiones** *ficticiae*.
Fideicommissaria hereditatis petitio, 482.
——— **libertas**, 110.
Fideicommissarius, 476.
Fideicommissum, an informal bequest, 476: characteristics of, 476: Ulpian's definition of, 477: assimilation of legata and fideicommissa by Justinian, 478, 479.
——— *orale*, 479.
——— *universal*, at first only produced a singular succession, 481: effect of the SC. Trebellianum, 482: becomes an indirect mode of heredis institutio, 483: modification of this result by the SC. Pegasianum, 483; effect of a, under Justinian, 483, 484.
Fidejussio (**Suretyship**), nature of, 298, 299, 304: creates a correal obligation, 279, 299: the beneficium excussionis sive ordinis in a, 299: contrasted with a constitutum debiti, 322: contrasted with older forms of suretyship (sponsio and fidepromissio) 298 (2).
Fidepromissio, an older form of suretyship, 298 (2).
Fiducia, a qualified mancipatio creating a trust (mancipatio fiduciae causa), 34: for what purposes it could be employed, 34, 35, 272, 289: the manner in which the trust was enforceable by actio fiduciae explained, 35, 36: first instance of a negotium bonae fidei, 36, 37: drawbacks of fiducia when used for purposes of a pledge and similar purposes, 273, 289, 290: contrasted with a mancipatory will, 451:
——— (in the sense of the thing mancipated fiduciae causa), 241 (1).
——— *cum amico, cum creditore contracta*, 34, 35.
Fiduciarius, 476.
Fiduciary ownership, 37 (12).
Filii vindicatio, *see* **Vindicatio**.
Filiusfamilias, means a homo alieni juris, 120: position of a, in public law, *ibid.*: by the private civil law he has passive but no active proprietary capacity, 121; the development of his full proprietary capacity in its successive stages down to Justinian, 121, 391, 392: liability of paterfamilias on contracts by, 337, 339: involuntary representation by, 146, 391; loans of money to, 292: adstipulatio by, 303: testamentary capacity of, 448.
——— *miles*, privileges of, 391, 446: will of, 448.
——— *And see* **Bona adventicia, castrensia; Noxae dare; Patria Potestas.**
Fiscus (**Caesaris**), becomes a private juristic person, 103: claims caduca, 385: takes bona vacantia loco heredis, 421.
Flamen Dialis, patria potestas extinguished if a son becomes, 393.
Flavius, 59: *see* **Jus Flavianum**.
Foenus, *see* **Interest**.
Foreclosure clause, 276.
Foreign trade, in Rome, importance of in legal history, 39, 40, 41.
Formula, meaning of, 52, 174: became a new kind of litis contestatio, 175: contrasted with litis contestatio, *ibid.*: advantages of the, over the litis contestatio, 176, 177: became the instrument by which the praetor asserted his control over the development of the law, 177, 178: parts and form of the, 179, 180 (*see* **Actiones**): in jus and in factum concepta, 184.
Formulary procedure, origin and development of, 163 ff.: the so-called 'introduction' of the, by the lex Aebutia explained, 168–170: the survival of the legis actio procedure in certain cases explained, 171, 172: true meaning of the change effected by the, 173: abolition of the, 223.
Foundations, are juristic persons, 101.

Fragmenta, technical meaning of, in the Corpus juris, 9.
——— **Vaticana**, 86 (2).
Fraud, *see* **Dolus**.
Free marriages, *see* **Marriage**.
Freedmen, *see* **Libertus**.
Freemen, are either ingenui or liberti, 113.
French Civil Code, 4, 5.
Fructus, 246: rights of an emphyteuta to, 269.
Fundus dotalis, enactment of Justinian on, 374.
——— **Italicus**, privileges of, 118 (2): a res mancipi, 229, 230: usucapio of, under the XII Tables, 240.
——— **provincialis**, could not be the object of quiritary ownership, 230, 240, 264, nor of civil jura in re, 264: the law changed by Justinian, 241.
Fur manifestus, 323: liable to manus injectio without previous summons, 157 (9).
Furiosus, has no capacity of action, 141, 142, nor delictual capacity, 143: cura of, 399: cannot make a will, 448, nor witness a will, 456 (9).
Furtum, 323–325: old forms of, 324: quasi-contractual liability of a thief, 317: husband and wife cannot sue one another for, 371.
——— *possessionis* and *usus*, 324.

G.

Gajus, lived when, 69: a Sabinian, *ibid.*: style of, 83: prestige of, *ibid.*: writings of, in the Law of Citations, 84: Justinian's Institutes founded in the main on, 88: Gothic epitome of, 94.
Gens, Gentilis, original meaning of, 359: later meaning of, *ibid.*: in the civil law of intestate succession, 437, 438: assembled in the **Comitia curiata**, q. v.
German Private Law, 6.
Germani, who are, 358.
Gesamthandprincip, 281 (4).
Gestio, meaning of, 396: is the essence of a cura, *ibid.*: the special power of a guardian depends on the extent of his, 403: distinguished from auctoritas, 404: pro herede, *see* **Pro herede gestio**.
Gift, *see* **Donatio**.
Glossators, 12, 13.
Gothofredus, 14.
Guardians, how appointed, 399–401: qualifications of, 401, 402: effect of the appointment on, 402, 403: excusationes of, *ibid.*: the special power of, 403: powers of, where there are several, 404: duties of, 404-406: degree of care required from, 405: security to be given by, *ibid.*: the obligation of several, is solidary, 282 (5), 405: remedies against, 405, 406: removal of, 406, 407: subject to the control of the state as guardian-in-chief, 407: *and see next word*.
Guardianship, the law of, place of, in the Law of Family, 355: two kinds of, 395: how distinguished, 396 (*see* **Cura**; **Tutela**): over minors, two stages of, 396, 397 (*and see* 141, 142): agnatic, over women, 398, and over furiosi and prodigi, 399, 401: a munus publicum, 402 (*and see* 32 (4)): creates a quasi-contractual liability, 319: termination of, 406, 407: of the state, 407: by women, 402: *and see* **Guardians**.

H.

Habitatio, a personal servitude, 261: not extinguished by non usus or capitis deminutio minima, 266.
Hadrian, causes the Edict to be consolidated, 55, 56: rescript on the collections of responsa, 64: epistola on the beneficium divisionis, 77 (2), 299: change in the law of intestate succession under, 442, and in the law of usucapio pro herede, 470: divers practices commencing about the reign of, 57 (14), 77 (2), 78, 118 (2).
Half-blood, collaterals of the, *see* **Collateral relations**.
Heir, *see* **Heres**.
Hereditary succession, *see* **Succession**.
Hereditas, defined and distinguished from bonorum possessio, 423, 434: delatio and acquisitio of, 413–415: assignment of, 418 (3): repudiatio of, 419, 430: a thing belonging to the, admitted of usucapio, 424: *and see* **Succession**.
——— *fideicommissaria*, 482.
——— *jacens*, 420–422.
——— *legitima*, assignable by in jure cessio 31 (4), 418 (3): of a mother in respect of intestate children, 442.
Hereditatis acquisitio, 414, 415: *and see* **Acquisitio**.
——— **aditio**, *see* **Aditio**.

Hereditatis delatio, 413, 414: *and see* **Delatio.**
——— **petitio**, the action for enforcing the heir's right of succession, 470, 190: a real action, 186: *and see* 171.
——— **petitio possessoria**, 434, 471.
——— **vindicatio**, tried by the centumviri, 150 (3).
Heres (Heir), quasi-contractual liability of, to legatees, 320: in Roman law a universal successor, 410 (*see* **Succession**): is either domesticus or extraneus, 415 (*see infra*): classes of heirs on intestacy under the old civil law, 437: degrees of heirs, 459: liability of heir for debts of deceased, 469: his beneficium inventarii and separationis, *ibid.*: inability, and incapacity, to become heir, 472 (*and see* **Institution**).
——— *domesticus*, who is, 415: succeeds by operation of law, *ibid.*: is either a suus et necessarius, 415, 416, or a necessarius, 417, 418: a slave as heres necessarius, 417: disinherison of a suus et necessarius, *see* **Exheredatio.**
——— *extraneus* (*voluntarius*), who is, 415, 418: how he may make aditio, 418, 419: period of deliberation of, 419: repudiatio by, 419, 430.
——— *legitimus*, meaning of, 418 (3): may assign the hereditas, *ibid.*
Heretics, disqualification of, 472.
High treason, disqualification of children of persons guilty of, 472.
Hire, contract of, *see* **Locatio conductio.**
History of Roman Law, as a branch of legal study, 6.
Hölder, on correal obligations, 282 (7): on exheredatio, 462 (5).
Homo sui juris and alieni juris, 120.
Honorius and Theodosius, on the periods of limitation of actions, 206.
Honour, civic, what is, 126.
Hostile property, 238.
Hotchpot, 439.
Household, community of, the essence of agnatic relationship, 356, 357.
Husband and wife, proprietary relations between, 369–372: in marriages with manus wife's entire property passes to husband, 366, 369, 370: liability of husband for wife's antenuptial debts, 369: in marriages without manus the principle of separate property applies, 370, 371, though modified by the agreement of dos, 372: mutual gifts between, *see* **Donatio inter virum et uxorem**: wife entitled to maintenance, 371: cannot sue one another for theft, *ibid.*: rights of succession between, 370, 441, 445, 447: *see* also **Dos**; **Marriage**; **Wife.**
Hyperocha, 276, 277, 293.
Hypotheca, nature of, 274, 275 (*and see* 34); privileged, of wife, 378, 380, and of ward, 405.

I.

Ideal parts, meaning of, 228.
Immiscere, by an heir, 416.
Impensae, could be deducted by husband in restoring the dos, 375: but under Justinian only if necessariae, 378.
Imperfect capacity of action, legal position of persons with, 141, 142.
Imperial legislation, effect on the development of the law down to Diocletian, 76–78: exclusive control over the development of the law since Diocletian, 78–82.
Imperium, opposed to jurisdictio, 50 (3): enabled the praetor to act as a legal reformer, 165: how resorted to for the purpose, 165, 166: paramount in the judicia imperio continentia, 169: the magistrate gives free play to his, in the extraordinary procedure, 212, 213.
Impetrare actionem, in the later procedure, 222.
Impetratio dominii, 276.
Implantatio, 244.
Impossibility of performance, when, extinguishes an obligation, 347.
Improbus pro herede possessor, 470 (1).
Imprudentia judicis, 330.
Impubes, legal position of an, 141: delictual capacity of an, 143: arrogatio of an, 386: cannot make a will, 448, nor witness a will, 456 (9): tutela of an, *see* **Tutela** *impuberum.*
In bonis esse, *see* **Bonitary ownership.**
In fraudem legis, what is a proceeding, 19.
In integrum restitutio, *see* **Restitutio.**
In jure and in judicio, proceedings in, meaning and nature of the division of the classical procedure into, 149, 150, 151, 152.

In jure cessio, *see* **Cessio in jure.**
In jus vocatio, in the legis actio procedure, 157 (9).
In libertate esse, meaning of, 115.
In mancipio, when a child was said to be, 390.
Inability to become heir, *see* **Heres.**
Inaedificatio, 244.
Incapacity, technical meaning of, 472: of caelibes and orbi, 385: unknown in Justinian's law, 472.
Incerta persona, a corporation was deemed an, 104, 459: other examples, 458, 459: a postumus was an, 463: institution of an, when void, 458, 459.
Indignus, meaning of, 472.
Individual ownership, unknown in the oldest times, 408: development of, 409.
Infamia, meaning of, 127: may be mediata or immediata, 127, 128: when it attached, 128: distinguished from turpitudo, *ibid.*: effects of, 128, 129, 384: effect of, under Justinian, 129: edict of the praetor on, **129.**
Infans, who is, 141: has no capacity of action, *ibid.*, nor delictual capacity, 143.
Inference, method of, in Jurisprudence, 20, 21.
Ingenuus, a libertus can be made, by imperial decree, 113.
Ingratitude, gifts revocable on the ground of, 138: a ground of disinherison, **468.**
Inheritance, the law of, 408 ff.: place of, in the legal system, 99: sale of an, 481.
Injuria, a delict, 328, 329: a libertus could sue his patron for, **113**: unsatisfactory result of a mere pecuniary condemnatio in an action for an, by a slave, 191: how redressed by the praetor, 194.
Inn-keeper, 318, 331.
Innominate real contracts, 294, 295.
Inofficiosum testamentum, *see* **Testamentum.**
Insanity, fiction of, 465 (6).
Insinuatio, required for validity of certain gifts, 138, 322: not so a mortis causa donatio, 486.
Institor, 337, **340.**
Institutes, of Justinian, 8, 87, 88: MSS. of, 13.
———, as a branch of legal study, 5, 6, 7, 8.
Institution, of heir, the essential part of a will, 448, 452, 453, 458: who can and who cannot be instituted, 449, 458, 459, 472: of juristic persons under Justinian, 449, 459: effect of conditions annexed to, 459, **460**: effect of, of a slave, 417: mutual, of ascendants and descendants (Nov. 115), 467: dispositions preceding the, void, 453.
Insula nata, 244.
Intentio, part of the formula, 179: formulates the question at issue, *ibid.*: in jus concepta, *ibid.*: in factum concepta, 180: an actio with a modified, is an actio utilis, 181: if the, contains a fiction, the actio is ficticia, 181, 182 (*for examples see* **Actiones** *ficticiae*): in regard to the rights claimed in the, the different intentiones exhibit the whole system of actions, 183: in personam and in rem, 185: certa and incerta, 187.
Intercessio, meaning of, 299, 300: of women, 199, 300.
Intercession of co-ordinate or superior magistrates, 51 (4), 151 (5).
Interdict, in the wider sense, is the decision of the magistrate acting extra ordinem, 213: what matters were dealt with by, 213, 214: in the narrower sense, defined, 215: meaning of interdict procedure, 215, 216: interdict procedure was preliminary to the ordinary procedure, 216: in Justinian's time, *ibid.*: examples of interdicts, **216, 217.**
——— *adipiscendae possessionis*, 434, **471.**
——— *de aqua, de fonte, de itinere*, 268.
——— *de liberis ducendis item exhibendis*, 368 (2), 390.
——— *de precario*, 214, 255, 256.
——— *de superficie*, 271.
——— *de uxore exhibenda ac ducenda*, 368.
——— *quorum bonorum*, 434, **471.**
——— *recuperandae possessionis*, 255, 256.
——— *retinendae possessionis*, 253, 254 (1), 256.
——— *Salvianum*, 274.
——— *unde vi*, 255, 256.
——— *uti possidetis*, 253–255.
——— *utrubi*, 254 (1).
Interdicta, place of, in the Edictum Hadrianum, 49 (2).
——— *duplicia*, 255.

Interdicta, *exhibitoria*, *prohibitoria*, and *restitutoria*, 215 (3).
——— for the protection of servitudes, 267, 268.
——— *possessoria*, 253–256.
——— *utilia*, 268.
Interesse, of creditor (quanti ea res est), meaning of the term, 287: debtor in stipulatio not bound to compensate creditor for, 302: *and see* 192.
Interest, payable for mora, 287: mutuum does not bind borrower to pay, 292: stipulatio for payment of, 297, 298: how calculated, 298: maximum allowed by the XII Tables, *ibid.*, by Justinian, *ibid.*
Interlocutiones, 76.
International law, a branch of public law, 16.
Interpolations, in the Digest, 89: in the Code, 90.
Interpretatio, followed the decemviral legislation, 29: develops in jure cessio, 30, 31; and emancipation, 32: converts mancipatio into a general mode of conveyance, 32, 33: works out the mancipatio fiduciae causa, 34–36: result of the, 37: in the Breviarium Alarici, 94.
Interpretation, logical and grammatical, 19.
Interrogatio in jure, 419.
Intestate succession, the only kind of succession in the oldest times, 409: rules of, bear witness to the ancient rights of the family, *ibid.*: operates a delatio hereditatis, 413: intestate and testamentary succession mutually exclusive, 414: order of, by the XII Tables, 426, 437, 438: order of, by the praetorian edict, 438–441 (*see* **Bonorum possessio** *ab intestato*): growing recognition of the cognatic principle in, 442: order of, under Justinian, 443–447: to a filius-familias, under the 118th Novel, 446.
Intimidation, *see* **Metus.**
Invecta et illata, hypotheca of, by tenant-farmers, 274: pignus tacitum of persons letting houses over tenants', 275.
Inventory, *see* **Beneficium inventarii.**
Involuntary representation, meaning of, 146: not a true representation, *ibid.*: by filiusfamilias, 146, 391 (*and see* 121).
Italicus fundus, *see* **Fundus.**
Iter, *see* **Servitus** *itineris.*

J.

Jhering, von, on the analysis of legal relations, 20: on manus injectio, 157 (10), 158 (12): on the protection of rights over res nec mancipi in the early law, 230 (2): on the position of married women in ancient Rome, 367 (1).
Joint obligation, *see* **Correal obligation.**
Joint ownership, *see* **Common ownership.**
Judex, original character and duties of, 150, 151: bound by customary law, 151 (4): relations of, to the praetor, how affected by the formula, 177, 178, 183: becomes an official, 220.
——— **datus, delegatus**, 221 (2), 222.
——— **pedaneus**, 222.
——— **qui litem suam facit**, 330.
Judgment, in the legal sense, *see* **Sententia**: effect of, 209, 210 (*see also* 283).
——— **debtor** (**Judicatus**), the debtor in nexum stands in the position of a, 26, 158: liable to immediate manus injectio, 157 (9), 158: could be released by nexi liberatio, 342.
Judicatus, *see* **Judgment debtor.**
Judicis postulatio, legis actio by, 154, 155.
Judicium, meaning of, in the classical procedure, 149, 152.
——— *divisorium*, 320 (*and see* 187, 236).
——— *duplex*, 255, 320.
——— *familiae erciscundae*, *see* **Actio** *familiae erciscundae.*
——— *imperio continens*, what it was, 165: meaning of, changes in consequence of the lex Aebutia, 169: did not consume a right of action, 175 (2).
——— *legitimum* (ex lege), explained, 165: meaning of, changes in consequence of the lex Aebutia, 169: when consumed a right of action, 175: *see also* 265.
propinquorum, 366 (*and see* 389).
——— *rescindens* and *rescissorium*, 218.
Julian (Emperor), on governor's powers of delegation, 222.
Julianus, Salvius, his consolidation of the Edict, 56: his works, and

position in Roman jurisprudence, 68, 69: nova clausula Juliani, 439 (2).
Julianus, professor in Constantinople, 13.
Jura in re aliena, 257 ff.: why necessary, 257, 258: how they differ from ownership, 231, 258: enumeration of the, known in Roman law, 258.
Jura patronatus, 113: not affected by the jus aureorum anulorum, *ibid.*
Juris possessio, of a servitude, 267: *and see* 470.
Jurisdictio, opposed to imperium, 50 (3).
Jurisprudence, *General*, 18–22: practical function of, 18–21: ideal function of, 21, 22.
——, *Roman*, 59 ff.: under the control of the pontifices, 59, 60, **61**: passes into the hands of laymen, 62: the **Jus respondendi**, q. v. (responsa prudentium), 63: schools of law (Sabinians and Proculians), 64–69: organization of the schools, 66, 67 (8): the difference between them illustrated, 68: classical jurisprudence, 68–72: brief account of the most eminent jurists, *ibid.*: the task of, 69: decline of, 71: achievements of, 73, 74, 75.
Juristic acts, 131 ff.: defined, 132: kinds of, *ibid.*: requisites of, 133, 134: motive (metus, dolus, error, donatio) as affecting, 135–139: qualifications of, 139, 140: capacity to conclude, 141–143: conclusion of, by a representative, 144–146.
—— **chemistry**, 20.
—— **laws**, and moral laws, 15 (2).
—— **literature**, the authority of the responsa prudentium is extended to, 83.
—— **person**, defined, 101: development of the conception of, in Roman law, 101–106: the discovery of the conception of, due to the Romans, 107: whether a hereditas jacens is a, 421: testamenti factio passiva of, 449, 459.
—— **possession**, *see* **Possession**.
Jurist-made law, *see* **Jus vetus**.
Jus, opposed to fas, 15 (2): opposed to leges in the later empire, 82: meaning of, in Roman civil procedure, 149, 150: *and see* **Law**.
—— **accrescendi**, of certain sui, 461, 463, 465.
—— **Aelianum**, publication of the legis actiones in the, 49 (2), 59, **62**.
Jus aequum, opposed to strictum, 18: adopted in the praetorian edict, 54.
—— **aureorum anulorum**, 113.
—— **civile**, defined, 23, 24: first codification of, in the XII Tables, 24: rivalry of the jus gentium, 44–47: narrower sense of the term, 47 (2), 54 (8): opposed to jus honorarium, 54: finally displaced by the jus gentium, 82: *and see* **Civis**.
—— **commercii**, *see* **Commercium**.
—— **connubii**, *see* **Connubium**.
—— **Flavianum**, 49 (2), 59, **62**.
—— **gentium**, defined, 23: how incorporated in Roman law, 44–48: administered by the praetor peregrinus, 52: displaces the jus civile, 82: *and see* **Peregrini**.
—— **honorarium**, 54: beginning of the vigorous development of, 178.
—— **honorum**, 112, 116, 128, 129 (4).
—— **Italicum**, 118 (2).
—— **Latii**, 118 (2), 119.
—— **liberorum**, 385, 442.
—— **moribus constitutum**, **16**.
—— **novum and vetus**, 82.
—— **Papirianum**, 28 (2).
—— **poenitendi**, 316.
—— **postliminii**, of a civis, 122, **123**: as to hostile property, 238.
—— **postulandi**, 127.
—— **privatum**, **16**.
—— **protimeseos**, 270.
—— **publicum**, **16**: in the technical sense, 17.
—— **respondendi**, 63: ceases to be granted, 71, 83.
—— **sacrum**, controlled by the pontifices, 59: position of slaves in, 109: relations of patronus and client in, 115: correal obligations originated in, 280.
—— **singulare**, defined, 18: how it arises illustrated, 217.
—— **strictum**, opposed to jus aequum, 18, 54.
—— **suffragii**, 116: extinguished by infamy, 128: loses all practical meaning in Justinian's time, 129 (4).
—— **tripertitum**, 458.
—— **trium vel quatuor liberorum**, 385, 442.
—— **vetus** (jurist-made law), opposed to jus novum (leges, imperial law), 82, 83, 84.
—— **vitae ac necis**, of paterfamilias, 389, 390: (of husband, *see* 365).
Jusjurandum in litem, 193.

Justa causa traditionis, 235.
Justinian, the Corpus juris of, 6, 7, 87–91, 95 : legal proficiency of, 81 : on leges generales, 80 (7) : abolishes prohibitions on certain intermarriages, 385 : *and for other changes in the law by Justinian, see especially sub verbis* **Actio** *rei uxoriae* ; **Adoptio** ; **Bequests** ; **Civis** ; **Cognati** ; **Compensatio** ; **Dediticii** ; **Donatio** ; **Dos** ; **Emancipatio** ; **Exheredatio** ; **Fideicommissum**; **Filiusfamilias**; **Fundus** ; **Incapacity**; **Institution**; **Intestate succession**; **Latini Juniani** ; **Libertus** ; **Manumissio**; **Novels**; **Noxae dare** ; **Ownership**; **Servitude**; **Stipulatio**; **Succession by necessity**; **Usucapio** ; **Wills**.
Justinus, or donationes ante nuptias, 381.
Justus titulus, in usucapio, 241 : not required in usucapio pro herede, 424.
Jütisch Low, 3 (1).

K.

Kalendarium, 305.
Keller, on Roman civil procedure, 148 (1).
Kind in der Were, 415 (1), 427 (4).

L.

Labeo, M. Antistius, important position of, in Roman jurisprudence, 65, 66 : reputed founder of the Proculian school, 64, 67 : Pomponius' account of, 75.
Laesio enormis, 310.
Latent defects, aedilician actions on, 310.
Latini coloniarii, who were, 118 : legal position of, *ibid.* : obtained the franchise from Caracalla, 119.
——— **Juniani**, who were, 111 : legal position of, 118, 119 : not included in Caracalla's extension of the franchise, 119 : abolished by Justinian, *ibid.*
Latium majus and minus, 118 (2).
Law, conception of, 14 : moral and juristic, 15 (2) : public and private, 15, 16 : origin of, 16 : customary and statute, 16 : local and general, 17 : absolute and permissive, 17 : law and right, 17, 18 : law and equity, 18 : the system of, 22.
——— **of Citations**, 84, 85, 88 (5).
Law of Family, Inheritance, &c., *see Table of Contents.*
Legacy, *see* **Bequests** ; **Legatum.**
Legal study, Justinian's plan of, 12.
Legatum, a formal bequest, 473–476 : an acquisitio civilis, 231 : a derivative mode of acquisition, 235 : charged in the alternative, 280 (2) : of part of an inheritance, 482 (1) : *and see* **Bequests.**
——— *per damnationem*, discharged by nexi liberatio, 341, 342 : nature and effect of, 473, 474, 475.
——— *per praeceptionem*, 474, 476.
——— *per vindicationem*, 473, 475 : a mode of acquiring a servitude, 265, 473.
——— *sinendi modo*, 474, 475.
Leges, opposed to jus in the later empire, 82.
——— **Barbarorum**, 92.
——— **Juliae**, on civil procedure, 168 : provisions of the, 170, 174 : true effect of the, 173.
——— **regiae**, 28 (2).
——— **Romanae**, in the German Kingdoms, 92 : compared with the Corpus juris, 96.
Legis actio, inflexibility of the, 52 : why so called, 152 : twofold sense in which the name could apply, 152, 153 : five forms of, 153 : defects of the, 164, 165 : superseded by the formulary procedure, 166–170, except in two cases, 171, 172.
——— *de arboribus succisis*, 155 (3), 164.
——— *fiduciae*, 155 (3).
——— *in factum and in jus concepta*, 156.
——— *per condictionem*, 155–157.
——— *per judicis postulationem*, 154, 155.
——— *per manus injectionem*, 157–159.
——— *per pignoris capionem*, 159–161.
——— *sacramento*, form of, 153, 154 : a general form of action, 161 : originally a form of self-help, how brought out in the ceremony, 162 (17) : was used in the centumviral court down to Diocletian, 171, 423 : supposed connection with the origin of bonorum possessio, 423.
Legitima hereditas, tutela, *see* **Hereditas** ; **Tutela.**
Legitimation, how effected, 385.
Legitimum judicium, *see* **Judicium** *legitimum.*

Leist, on the origin of bonorum possessio, 425 (1).
Lenel, das Edictum perpetuum, 58, 129 (5), 325 (2): Palingenesia juris civilis, 75.
Leoniana constitutio, on stipulationes, **304**.
Letting and hiring, *see* **Locatio conductio.**
Lex, strict meaning of, 28 (1).
——— *Aebutia*, provisions of, 168, 169: true effect of the, explained, 173, **174**.
——— *Aelia Sentia*, provision concerning the devolution of the property of certain dediticii, 55 (10): provisions on manumissions, 114.
——— *Aquilia*, 326–328: caput i, 326, 327 (5), **328**: caput ii, 326 (4): caput iii, 326 (4) 327 (5), **328**.
——— *Atilia*, 400.
——— *Atinia*, 242, **243**.
——— *Calpurnia*, 155.
——— *Canuleja*, 360.
——— *Cincia*, 138, 199.
——— *Claudia*, 398.
——— *commissoria*, 273 (2), 276.
——— *Cornelia* (de edictis), 51, **57**.
——— ——— (de injuriis), 329.
——— ——— (de postliminio), 123.
——— *duodecim tabularum*, 24 ff.: *see* **Twelve Tables.**
——— *Falcidia*, 480.
——— *Fufia Caninia*, 114.
——— *Furia de sponsu*, 299 (2).
——— *Furia* (testamentaria), 479.
——— *Julia de adulteriis*, on fundus dotalis, 374: on divorce, 382.
——— *Julia* (*de cessione bonorum*), 211.
——— —— *de fundo dotali*, 374.
——— —— *de maritandis ordinibus*, 384.
——— —— *et Papia Poppaea*, *see* **Lex** *Papia Poppaea.*
——— —— *et Plautia*, 242, **243**.
——— —— *et Titia*, 400.
——— *Junia Norbana*, 111.
——— *Junia* (*Velleja*), **460**, 463.
——— *Laetoria*, 218 (4).
——— *Papia Poppaea*, forbidding certain intermarriages, 112 (4): generally, 384: on orbi, **385**, 472.
——— *Pinaria*, 156 (6).
——— *Plaetoria*, relief to minors, 217, 218: allows minors to apply for a curator, 397.
——— *Poetelia*, 210.
——— *Romana Burgundionum*, 92, 94 (5).
Lex *Romana Visigothorum*, 92, 93, 94.
——— *Scribonia*, 265.
——— *Silia*, 155.
——— *specialis*, 18.
——— *Vallia*, 289.
——— *Voconia*, 437 (1), 480.
——— *Zenoniana*, **270**.
Libellus familiae, 305.
Liber Authenticorum, 14.
——— **kalendarii**, 305.
——— **patrimonii**, 305.
Liberi, in the praetorian edict, who are, 438, 439.
——— naturales, 364.
Libertas fideicommissaria, 110.
Libertus, legal position of, prior to Justinian, 112: under Justinian, 113: classes of liberti, 111, abolished by Justinian, *ibid.*: enactment forbidding certain persons to intermarry with a, 384: stipulatio by, onerandae libertatis causa, **113**: could sue patron for atrox injuria, *ibid.*: could not summon patron without leave from the praetor, 180, **184**.
—— *orcinus*, 110, **111**.
Libripens, meaning and function of, in mancipatio, 24, 25: in nexum, 26, 288 (*see* 341): in the mancipatory will, 450.
Lien, 203.
Limitation of actions, 206, 207: time does not run against whom, **208**.
Lis infitiando crescit, 326.
Litem suam facere, a quasi-delict, 330.
Literal contract, 305 ff., one of the four civil law contracts, 288: early development of, in connection with loans, 290: nature and effect of, 305–307: how extinguished, 307: distinguished from nomen arcarium, 308: fell into disuse, 308, 343.
Litis aestimatio, 210.
——— **contestatio**, nature and object of, 149: why so called, 149 (2): closes the proceedings in jure, 152: in the early procedure a solemn act of the parties, 152: constitutes the pith and climax of the legis actio procedure, 163: cannot be repeated, *ibid.*: consumes the right of action, *ibid.* (*and see* 204): drawbacks of the oral, 164, 167: superseded by the written formula of the magistrate, 174: force of the new, 175, 176: legal effects of, 208, 209 (*see* 354): compared with novatio, 209: effect

of, on a correal obligation, 283: changed by Justinian, *ibid.*
Loan, for consumption, 291: *see* **Mutuum**: for use, 292: *see* **Commodatum**: *and see* **Nexum.**
Locare, literal meaning of, 312 (1).
Locatio conductio, 311–313: rei, 311: operarum, *ibid.*: operis, 312: if doubtful whether facts constitute, must sue praescriptis verbis, 295 (1).
Locus religiosus, the grave of a slave a, 109.
Longi temporis praescriptio (possessio), 240, 241.
Longissimi temporis praescriptio (possessio), 242.
Lost property, 238.
Lucra nuptialia, rule on, in case of second marriages, 384.
Lucrativae causae, concurrence of, 345, 347.
Lunatic, *see* **Furiosus.**

M.

Magistrate, can issue edicts, 48: jurisdictio and imperium of, 50 (3): autocratic powers of, in the republic, 51, 55: the power of, how superseded in the empire, 55, 56: formally superseded by imperial officials, 221.
Magisterial guardianship, 400.
Maintenance, claims for, tried extra ordinem, 213: habitatio and operae servorum granted for purposes of, 261: wife entitled to, 371.
Malae fidei possessor, liability of, 249 (1).
Mancipatio, the sale of early Roman law, 24: form and operation of, 25, 26: how developed by the interpretatio, 32–37: only open to cives, 39: what things capable of, 229, 230: an acquisitio civilis, 231: of servitudes, 263: in adoption, 387: of a filiusfamilias, 389: in emancipation, 393.
——— *familiae*, *see* **Testamentum** *per aes et libram.*
——— *fiduciae causa*, *see* **Fiducia.**
——— *sestertio nummo uno*, how developed, 33: a fictitious sale, *ibid.*: advantages of, when used in a real sale, 33 (7): used for the various cases of fiducia, 34, 37, 272.
Mancipatory will, *see* **Testamentum** *per aes et libram.*
Mancipium, a sale into, changes the agnatic family, 124: a child in mancipio was servi loco, 390.
Mandata principis, 76, 77.
Mandatum, a consensual contract, 314, 315: oldest form of, 451.
——— *actionis* (processual mandatum), 332, 333.
——— *contra bonos mores*, 315.
——— *in rem suam*, 332–334.
——— *tua gratia*, 315.
Manum depellere, injicere, 158.
Manumissio, 110–114; kinds of, 110–112: vindicta, censu, testamento, 110: effect of, 112, 113: legislative restrictions on, 114: Justinian abolishes the lex Fufia Caninia restricting testamentary manumissions, *ibid.*: conditional, makes the slave statu liber, 115: in jure cessio first used for purposes of, 30 (3).
Manumissor, parens, in emancipation, 393: guardianship by, 398 (2): rights of intestate succession by civil law, 438: under the SC. Tertullianum, 442.
Manus (mariti), nature of, 365: effect on person and property of wife, 365, 366: a wife in manu is legally the sister of her children, 356, 366: passing in manum mariti involves capitis deminutio minima, 124, 125: father has, over the wife of a filiusfamilias, 121: no marriage complete without, in the early law, 359: modes of acquiring, 359, 360, 361: jus connubii is the right to marry with, 360: disappears in the empire, 363: extinction of, 381, 382: *and see* **Husband and wife**; **Marriage.**
Manus injectio, gave rise to a legis actio, 157: meaning of, *ibid.*: extrajudicial, 157 (9): judicial, 157, 158: pura and pro judicato, 159: was the only kind of execution in the early law, 210: *and see* **Execution.**
Manus militaris, enforcement of an order by, 212, 213.
Manuscripts, of the Corpus juris, 11 ff.
Marcus Aurelius, decree on self-help, 77 (2), 148: on the exceptio doli when inserted for purposes of a counter-claim, 350: constitutio on excusationes, 402: rescript on bonorum possessio contra tabulas, 465.
Marital power, in marriages with manus, *see* **Manus**: in marriages without manus, 367, 368: marital power in free and strict marriages contrasted, 367.
Marriage, 359 ff.: defined, 359: not

complete in the early law without **Manus** (q. v.), *ibid.*: by **Coëmtio** (q. v.), 359, 360, **365**: by confarreatio, 360, **365**: by usus, 361–363, **365**: strict and free, 363: free marriages, how concluded in Justinian's time, 363: termination of (*see* **Divorce**), 381–384: effect of, on property of wife, *see* **Husband and wife**: between certain persons prohibited, 384: second marriages, *ibid.*

Master, how liable for acts of slave, *see* **Slave.**

Materfamilias, only an uxor in manu strictly a, 363.

Matrimonial cohabitation, creates a legal relation, 363: must be uninterrupted, 361: may ripen into full marriage, *ibid.*

Measure of damages, under the lex Aquilia, 326.

Mental reservation, 133.

Merx peculiaris, 336.

Messenger, distinguished from representative, 144.

Metus, meaning of, 135, 329: does not affect the validity of juristic acts by civil law, *ibid.*, praetorian remedies for, the **Actio** *quod metus causa*, (q. v.) and the **Exceptio** *quod metus causa* (q. v.), 135, 136: a ground for in integrum restitutio, *see* **Restitutio**: a special case of dolus, 330.

Miles, filiusfamilias, *see* **Filiusfamilias; Soldier.**

Minor, is either infans, 141, or impubes, *ibid.*; or pubes minor XXV annis, 142: legal position of, 141, 142: *see also* **Cura** (minorum), **Tutela** *impuberum*, **Restitutio** (minorum).

Minutio existimationis, *see* **Existimatio.**

Missio in bona (real execution), *see* **Execution.**

——— **in possessionem**, granted by the praetor, 213, 275.

Mistake, *see* **Error.**

Modes of extinguishing obligations, operating ipso jure, 340–347, and ope exceptionis, 347–354.

Modestinus, Herennius, 71: writings of, in the Law of Citations, 84.

Modus, defined, 140: the statutory share in a will must not be subject to, 466.

Mommsen, his edition of the Digest, 13: on the L. A. sacramento, 172 (8): on emtio venditio, 312 (1).

Money, no coined, before the XII Tables, 25: a res fungibilis, 227, 316

Mora, renders debtor in a negotium bonae fidei liable to pay interest, 287: otherwise in mutuum, 292, and in stipulatio, 302.

Moral and juristic laws, 15 (2).

Mores graviores et leviores, husband's right of retainer on account of, 376.

Mortis causa capio, explained, 484, 485.

——— ——— **donatio**, *see* **Donatio.**

Motive, as affecting juristic acts, *see* **Juristic acts.**

Mourning, widow's year of, *see* **Widow.**

Municipium, a **Juristic person** (q. v.), 103: cannot be heir, 104 (1): *but see* 449, 459

Mutuum, superseded nexum, 37, 289, but retained a trace of its original severity, 37, 38, 289: a real contract, 289, 291: nature and effect of, 291, 292, **295**: by a filiusfamilias, 200, 292: does not bind to payment of interest, 292, 297.

Mutuus dissensus, *see* **Contraria voluntas.**

Mysteries, 67 (8).

N.

Nasciturus, legal position of, 101, 102: may be instituted heir, 449, 472: (*and see*, as to a universal fideicommissum, 482.)

Natalium restitutio, 113.

Naturales acquisitiones, 232.

Naturalis obligatio, explained, 321: a nudum pactum gives rise to a, *ibid.*: a slave's contracts give rise to a, 108, 335: can be secured by sureties and discharged by payment, 108 (1).

Nautae, 318, 331.

Necessarius heres, *see* **Heres** *domesticus.*

Necessity, succession by, 460 ff.: *see* **Succession.**

Negligence, *see* **Culpa.**

Negotia bonae fidei, nature of, 37: fiducia the first recognised instance and the foundation of, 36: the genius of Roman law most conspicuous in the rules concerning, 74: definition of, 286 (*see* 187): rules of law concerning, 286, 287: as to diligentia, 286: as to creditor's interesse, 287: as to casus, *ibid.*: a release ipso jure

debars creditor from suing on, 347: compensatio in, 348, 349: *and see* **Actiones** *bonae fidei*.

Negotia claudicantia, 141.

——— **stricti juris**, nexum the type and basis of, 38: defined, 286 (*see* 187): unfair operation of a mere pecuniary condemnation in, 191, 192: how remedied by the praetor, 194, 195: instances of, 291, 292 (mutuum), 302 (stipulatio), 307 (expensilatio): a release inoperative in, by civil law, 348: dispute as to effect of defendant satisfying plaintiff in, after litis contestatio, 68.

Negotiorum gestio, 318, 319.

Nemo pro parte testatus, &c., meaning of the rule, 414, 448: soldiers exempt from rule, 448.

Nero, *see* **SC.** *Neronianum*.

Nexi liberatio, a formal mode of extinguishing obligations, 341: what debts could be extinguished by, *ibid.*: became a form of release, 342: two things needed to effect the discharge, 342 (1): how transacted, **344**.

Nexum, the formal loan of the early law, 26, 288: effect of, 26, 289: rigour of execution on, 27, 210, 289: superseded by mutuum, 37, 289: type and basis of negotia stricti juris, 38: only open to cives, 39: debtor in, stood in position of judgment-debtor, 26, 158: Varro's definition of, **291**: *and see* **Nexi liberatio**.

Nomen arcarium, explained and distinguished from expensilatio, 307, 308, **309**.

——— **transscripticium**, 307, **308**.

Nomina, destroyed by assignment of hereditas post aditam hereditatem, 418 (3).

Nominate real contracts, enumerated, 291.

Nominatio potioris, 402.

Nominatores (Postulatores), subsidiary liability of, to ward, 405.

Non usus, as a mode of extinguishing servitudes, 266.

Nota censoria, *see* **Censor.**

Notice, effect of, on an assignment of an obligation, 333: payment by debtor, without, 334.

Nova clausula Juliani, 439 (2).

Nova edicta, novae clausulae, 51.

Novation, meaning of, 300: by stipulatio with change of parties, 300, 301, without change of parties, 301, 302: by literal contract, 307: compared with litis contestatio, 209: distinguished from assignment, 335: compared with solutio, 346: Justinian on, **346**, **347**.

Novels, what they were, 10: MSS. of, 13, 14: collection of, 91: post-Theodosian, 87, 94.

4th Novel, introduces the beneficium excussionis, 299.

18th Novel, on the amount of the statutory share, 467.

61st Novel, on land comprised in a donatio propter nuptias, 381.

78th Novel, on the status of liberti, 113.

84th Novel, gives a preference to collaterals of the half blood over those of the whole blood in intestate succession, 442.

97th Novel, on donationes ante (propter) nuptias, 381.

99th Novel, on the beneficium divisionis, 283.

115th Novel, on the mutual institution and disinherison of certain ascendants and descendants, 467, 468: parts of, quoted, **468**.

118th Novel, scheme of intestate succession according to the, 443–446: parts of, quoted, **447**.

127th Novel, on intestate succession, 444 (9), 445.

Noxae dare (noxae datio, deditio), of a slave for a delict, 191, 194, 331: of a wife in manu, 369: of a filius-familias, 389, 390: noxae datio of filiifamilias abolished by Justinian, 390.

Noxal action, *see* **Actio** *noxalis*.

Nudum jus Quiritium, meaning of, 233.

——— **pactum**, what is a, 321: produces a **Naturalis obligatio** (q. v.), *ibid.*

Nuncupatio, in the mancipatio, 33: rule of XII Tables concerning, **32**, how utilized by the interpretatio, 33–36: in a mancipatory will, 450–451, **454**: in a fiducia and a mancipatory will distinguished, 451.

O.

Obervormundschaftsbehörde, 407.

Obligatio, obligation, conception of, 278, 279: distinguished from family and public rights, 278: refers to acts reducible to a money value, 278,

279: Paulus' definition of, 279: correal and solidary, *see* **Correal obligation**: contents of an, 285, 286: its object is either dare (obligatio dandi) or facere (obligatio faciendi), 285: may be certa or incerta, 285, 286: bonae fidei or stricti juris, 286 (*see* **Negotia**): arises either ex contractu or ex delicto, 287: ex contractu, 287 ff. (*see* **Contract**): quasi ex contractu, 315–323: ex delicto, 323–330: quasi ex delicto, 330, 331: obligatio naturalis, 321 (*see* **Naturalis obligatio**): transfer of, 332–335: not assignable by civil law, 332 (*and see* 180): liability for an, contracted by another, 335–340: extinction of, modes operating ipso jure, 340–347 (contrarius actus, 341–344: satisfaction of creditor, solutio, 345–347: impossibility of performance, 347): operating ope exceptionis, 347–354 (pactum de non petendo, 347, 348: compensatio, 348–354: litis contestatio, 354): *see also next word and* **Obligatory rights**.

Obligations, the Law of, 278 ff.: place of, in the legal system, 99: achievements of Roman jurisprudence in the domain of, 74.

Obligatory pacts, 321.

Obligatory rights, defined, 98: can only be enforced by action, 148: distinguished from other, especially real rights, 185: destroyed by assignment of an hereditas, when, 418 (3): *and see* **Obligatio**; **Contract**.

Occupatio, an original mode of acquisition, 237, 238.

Omnia judicia sunt absolutoria, 68.

Ope exceptionis, defences operating, 197, 198: modes of extinguishing obligations operating, 340, 347–354 (*see* **Obligatio**).

Operae illiberales, the subject-matter of locatio conductio operarum, 311.

——— **servorum**, a personal servitude, 261: not extinguished by non usus or capitis deminutio minima, 266.

Opus, meaning of, in locatio conductio operis, 312.

Oral will, *see* **Wills**.

Oratio, of the emperor, 78, 79: instances, 372, 403.

Orbi, incapacities of, 385, 472.

Orcinus libertus, 110, 111.

Ordinare, meaning of the word, 149 (2).

Original acquisition, 237–246: *see* **Ownership**.

Ownership, 231 ff.: conception of, 231: distinguished from jura in re aliena, 231, 258: acquisition of, 231–248: civil and natural modes of acquisition, 231–233: origin of the distinction, 232–233: quiritary and bonitary ownership (dominium ex jure Quiritium and in bonis esse), *ibid.*: only a civis can be a quiritary owner, 116: Justinian abolishes quiritary ownership, 233: derivative acquisition of, explained, 234 (by traditio, 234, 235: by legatum, 235: by adjudicatio, 236, 237): original acquisition of, explained, 237 (by occupatio, 237, 238: by usucapio, 238–243: by accession, 243–245: by specification, 245, 246: fructus, 246): protection of, by rei vindicatio, 248, 249, by actio negatoria, 249, by actio Publiciana, 251, by possessory remedies, 256, 257: distinguished from possession, 252: fiduciary ownership, what is, 37 (12): *see also* **Fundus Italicus** and **provincialis**.

P.

Pacta adjecta, 321, 322.

——— **legitima**, 322.

——— **nuda**, 321.

——— **praetoria**, 322.

——— **vestita**, what are, 321: three classes of, *ibid.*

Pactio, definition of, *see* **Agreement**.

——— **et stipulatio**, creation of servitudes by, 264, 265.

Pactum conventum, what it is, 35: not enforceable, *ibid.*

——— **de non petendo**, extinguishes an obligation ope exceptionis, 347, 348 (*and see* 198).

——— **fiduciae**, not as such enforceable, 35.

——— **venditionis**, in pledges, 273 (2).

Paganus, meaning of, 448 (1).

Pandects, 9, 88: *see* **Digest**.

——— **the law of the**, in modern Germany, 3, 4, 5.

Papian, 92, 94 (5).

Papinian, his eminent position in Roman jurisprudence, 70: writings of, in the Law of Citations, 84, 85: writings of, in the compilation of the Digest, 88: in the Breviarium Alarici, 94.

Papirianum, jus civile, 28 (2).

Papirius Justus, libri xx constitutionum, 86 (3).
Paraphernalia, 370.
Parens binubus, 384.
——— **manumissor**, *see* **Manumissor.**
Partikularrecht, 17.
Partitio legata, 482 (1).
Partition suit, an actio in rem scripta, 187: when necessary, 236: effect of an adjudicatio in, 237: three kinds of, 320.
Partnership, 313, 314.
Paterfamilias, means a homo sui juris, 120: Ulpian's definition of, **121**: all the rights acquired by a filiusfamilias vest in the, 121 (*see* **Filiusfamilias**): how far liable for contracts of filiusfamilias, 337, **339**: rights of, in respect of the son's bona adventicia, 392: power of, over person of filiusfamilias, *see* **Patria potestas.**
Patria potestas, place of the law of, in the law of family, 355: originates either in a rule of law, 385, or in a juristic act (adoption), 386–389: in the early law confers absolute power over those in potestate, 389: otherwise in the empire, 390: remedies for the assertion of, 390, 391: effect of, on the property of the filiusfamilias, 391–393: modes of extinction of, 393–395: conception of, how different from the Teutonic conception of parental power, 394: peculiar to cives, 116: manus mariti in the old law indistinguishable from, 366: community of, constitutes an agnatic family, 124, 366.
Patricius, a child by becoming a, is freed from patria potestas, 393.
Patronus, rights of, against his libertus, 112, 113 (*and see* 180): cannot enforce a stipulatio onerandae libertatis causa against the libertus, **113**: relationship of, to clientes in the early law, 115: guardianship of, over an unmarried liberta, 398 (2): *and see* **Libertus.**
Paulus, Julius, his position in Roman jurisprudence, 71: writings of, in the Law of Citations, 84, and in the Breviarium Alarici, 94.
Pauperies, 331.
Payment, only extinguishes an obligation in the old law if formal, 341: informal, sufficient later, 345.
Peculium, of the filiusfamilias, 121, 391, 392: of slaves, 108, 335, 336: effect of contracts between master and slave on the, 336: *and see* **Bona adventicia, castrensia, quasi-castrensia.**
Peculium profecticium, what it was, 121: remains the property of the father, 121, 392: father's liability for debts of son may be restricted to the, 337.
Pedaneus judex, 222.
Pegasiani, 65.
Pegasus, 65.
Penalty, stipulatio to pay a specified, 298.
Pendency, litis contestatio results in the, of the cause, 208: of a legal relationship illustrated by the hereditas jacens, 421.
Peregrini (**Aliens**), excluded from the formal acts of the early law, 39, unless privileged by express treaty, 40: a law for aliens (jus gentium) results from this exclusion, 41: legal position of, 116, 117: enfranchised by Caracalla, 117: distinction between cives and peregrini is not known in Justinian's law, 119: cannot marry with manus, 363: cannot make a Roman will, 448, nor witness a will, 456 (3).
Peremptory exceptiones, 204, **205.**
Periculum rei, in sales, 310.
Permissive law, *see* **Law.**
——— **possession**, 214.
Person, conception of, 101: natural persons, 101, 102: juristic (moral) persons, 102–107 (*see* **Juristic person**): a slave not a, 108.
Persona incerta, *see* **Incerta persona.**
Personal actions, the special legis actiones are forms of, 161: *and see* 185.
——— **execution**, *see* **Execution.**
——— **servitudes**, *see* **Servitude.**
Persons, the Law of, 101 ff.: place of, in the legal system, 98, 99.
Petitory action, opposed to a possessory remedy, 256.
Pignora caedere, 159, 160 (14).
Pignoris capio, legis actio by, 159–161.
Pignoris causa est individua, 276.
Pignus, as creating a jus in re aliena, 273, 274, 275: contract of, 293: *see also* **Pledge.**
——— *conventionale*, 275.
——— *in causa judicati captum*, 212.
——— *judiciale*, 275.
——— *legale sive tacitum*, 275.
——— *praetorium*, 275.

Pileatus, 112.
Pledge, 272 ff.: right of, defined, 272: history of, 272–275: fiducia, 272, 273: pignus, 273, 274: hypotheca, 274, 275: rules of law concerning, 275–277: modes in which a right of, originates, 275: rights of the pledgee, *ibid.*: right of sale, 276: lex commissoria, *ibid.*: priority as between several pledgees, *ibid.*: privileged, 276 (*see also* 378): extinction of a right of, 276, 277: contract of, 293.
Plurality of debtors and creditors, 279 ff.: *see* **Correal obligation.**
Plus petitio, causes plaintiff to lose his suit, 191.
Poenae secundarum nuptiarum, 384.
Pomponius, Sextus, 69.
Pontifices, controlled at first the development of the civil law, 30, 59: the judges bound by the responsa of the, 62: cease to play any part in the development of the law, 63.
Portio virilis, meaning of, 445.
Possession, 252 ff.: distinguished from ownership, 252, **257**: detention, *ibid.*: juristic possession, 253: the two elements of juristic possession, 253, **257**: protection of juristic possession (possessory interdicts), 253–256: (uti possidetis, 253–255: utrubi, 254 (1): unde vi and de precario, 255, 256): possession vi, clam, precario, 254: quasi-possession, 267: longi temporis possessio, 240, 241: of usucapiens, *see* **Usucapio possession**: acquisition of, through those in potestate, *see* **Filiusfamilias**; **Slave**: *and see next word.*
Possessor *bonae fidei*, *see* **Bonae fidei possessor.**
——— *corporis* and *juris*, 267, 470.
——— *malae fidei*, 249 (1).
——— *pro herede*, 470, 471.
——— *pro possessore*, who is, 470 (1).
Possessory interdicts, *see* **Possession.**
——— **remedies**, opposed to petitory actions, 256.
Postliminium, *see* **Jus postliminii.**
Post-Theodosian Novels, 87, 94.
Postulare, the right to, how affected by infamy, 127.
Postulatio judicis, legis actio by, 154, 155.
——— **tutoris**, 401.
Postulatores, *see* **Nominatores.**
Postumi, are personae incertae, 458, 463: could not at first be instituted or disinherited, 463: changes in the law, 463, 464.
Postumi *Aquiliani*, 464.
——— *legitimi*, 463.
——— *sui*, who are, 416: institution of, 458, 464: exheredatio of, 459, 463, 464.
——— *Vellejani*, 463.
Potestas, *see* **Dominica** and **Patria potestas.**
Potioris nominatio, 402.
Power, relations of, of two kinds, 15.
Praedial servitudes, *see* **Servitude.**
Praedium *dominans* and *serviens*, 262.
——— *rusticum*, 262: belonging to a ward, 403.
——— *suburbanum*, belonging to a ward, 403.
——— *urbanum*, 262.
Praefectus praetorio, 221.
——— **urbi**, 220.
Praejudicium (actio praejudicialis), what it was, 186, **188**: formula in, 189: must be resorted to by a paterfamilias when, 391.
Praescriptio (a plea), longi temporis, 240: temporis, 206.
———, obreptionis and subreptionis, 221 (2).
——— (as a mode of acquisition), *see* **Usucapio.**
Praescriptis verbis agere, *see* **Actio** *in factum civilis.*
Praesides provinciarum, had power to issue edicts, 56 (*and see* 220): *see* **Edictum** *provinciale*: introduce the praescriptio longi temporis, 240.
Praestationes personales, right to, 320.
Praeteritio, effect of, of sui by the civil law, 463, of postumi sui, 464: by praetorian law, 464.
Praetermittere hereditatem, 431 (12).
Praetor, literal meaning of, 48 (1): had no power to legislate, 52: growth and decline of power of, *see* **Edict of the Praetor**: becomes a mere official, 220: could not make a person heres, 432 (*and see* **Bonorum possessio**): *see also* **Formula**; **Magistrate.**
——— *fideicommissarius*, 477.
——— *peregrinus*, appointment of, 41, marks the final recognition of the jus gentium, *ibid.*: jurisdiction of, 48: the jus gentium acquires a fixed form in the edict of the, 52: was probably the first to use the formulary pro-

cedure, 166: procedure in court of, not affected by the lex Aebutia, 169.
Praetor *urbanus*, functions of, 48: jurisdiction of, 52: development of the formulary procedure in the court of, 167: effect of the lex Aebutia on the procedure in the court of, 169.
Praetores tutelares, 400.
Precarium, interdict for recovery of land held by, 255, 256: the praetor's mode of proceeding explained, 214: distinguished from locatio conductio and commodatum, 255 (3).
Prescription, *see* **Usucapio.**
Princeps (Principatus), 76.
Principal and agent, *see* **Agency; Representation.**
Prior tempore potior jure, 276.
Priority of pledges, 276.
Private delicts, what are, 323.
——— **law**, opposed to public law, 15, 16: the nature of, 98: the system of, 99, 100.
——— **ownership**, unknown in the oldest times, 408, 409.
Privilege, technical meaning of, 18.
Privileged right of pledge, *see* **Hypotheca.**
——— **wills**, 457.
Probabilia, Labeo's collection of, 66.
Procedure, law of, 147 ff.: a branch of public law, 16: in the later empire, 220–224: extra ordinem, *see* **Extraordinary procedure**: *and see* **Formulary procedure; Legis actio; Roman civil procedure.**
Processual agency, *see* **Agency.**
Proculians, *see* **Jurisprudence**, *Roman.*
Proculus, 65.
Procurator, a free representative, 145: his position in Roman law, 145, 146: in rem suam, 332: formula in an actio by, *ibid.*
Prodigus, has imperfect capacity of action, 141: has delictual capacity, 143: cura of, 399: cannot make a will, 448, nor witness a will, 456 (9).
Pro herede gestio, a valid aditio, 418, 419: distinguished from cretio, 427 (5).
——— **possessio**, *see* **Possessor** *pro herede.*
Pronuntiatio, in a praejudicium, 189: declaring the plaintiff's right, 193.
Property, law of, 131 ff.: meaning of, and place in the legal system, 98, 99.
Proprietary capacity, the law of persons deals with, 98: defined and distinguished from capacity of action, 143: of filiusfamilias, *see* **Filiusfamilias.**
Protection, of rights in general (Law of Procedure), 147 ff.: of ownership, 248, 249: of usucapio possession, 249–251: of juristic possession, 252–257: of servitudes, 266–268.
Protutor, who is, 406.
Provincial soil, *see* **Fundus provincialis.**
Provocatio, in the old law, 151 (5).
Proximus agnatus, his right of intestate succession by the civil law, 437.
Prussian Landrecht, 4, 5.
Public law, contrasted with private law, 15, 16: what it includes, 16: the provisions of Hadrian's enactment consolidating the edict referable to the domain of, 56 (18): civil exceptiones give effect to rules of, 200.
Pupillary substitution, *see* **Substitution.**
Pupillus, *see* **Ward.**
Pure Family Law, 16, 99.
Putativus titulus, 241 (1).

Q.

Quanti ea res est, *see* **Interesse.**
Quarta divi Pii, 387.
——— **Falcidia**, 480.
——— **Trebellianica**, 483.
Quasi contractus, 315–321.
——— **delicta**, 330, 331.
——— **possessio**, 267.
——— **traditio**, 264, 265.
——— **ususfructus**, 260.
Querela inofficiosi testamenti, barred in five years, 206 (1), 466: who may bring, 465: effect of, if successful, before Justinian, 466: an actio vindictam spirans, *ibid.*: change by Justinian, 467: when brothers and sisters may bring a, 128, 468.
Quinquaginta decisiones, 89 (7).
Quiritary ownership, *see* **Ownership.**
Quorum bonorum, interdictum, 434, 471.
Quot generationes tot gradus, 358.

R.

Rapina, a delict, 325.
Ratio scripta, meaning of, 3 (1), 45.
Real actions, *see* **Actiones** *in personam* and *in rem.*
——— **contracts**, why so called, 288,

291: nominate (mutuum, commodatum, depositum, pignus), 291–293: innominate, 294, 295.
Real rights, defined, 98, 230: distinguished from obligatory rights, 98, 185: include ownership and jura in re, 231.
——— servitudes, *see* **Servitude**.
Reception of Roman law in Germany, 1, 2.
Receptum nautarum, etc., 318.
Recuperatores, tried cases where peregrini were parties, 40: when appointed by the praetor, 150 (3).
Regula Catoniana, 61 (2a).
Rei vindicatio, *see* **Vindicatio**.
Reichskammergericht, 3 (1).
Relations, agnatic, 356: cognatic, 357: lineal and collateral, 358: of the whole and the half blood, *ibid.*
Release, by literal acceptilatio, 307: formal, *see* **Acceptilatio** (*verbal*): informal, *see* **Pactum de non petendo**.
Remancipatio, divorce by, 381, 382: in the ceremony of adoption, 388, and of emancipation, 393.
Remissio, of rent by lessor, 312.
Remotio suspecti tutoris, 407.
Replicatio, in pleading, 204, **205**: example of, 348: doli, 176 (2).
Representation, 144 ff.: nature of, 144: representative and messenger distinguished, *ibid.*: tutelary and procuratorial, 145: difference between Roman and modern principles of, *ibid.*: secret (undisclosed principal), 146: involuntary, 146, 391: by an adstipulator, 303: by a mandatary, 314: liability of principal for contracts of representative, 337, 338: *and see* **Agency**.
———, right of, in the rules of succession, 443, 444, 445.
Repromissio, 176 (3).
Repudiatio hereditatis, 419, 430.
Repudium, 382.
Res, meaning of, in Roman law, 225: kinds of, 225–230: different unions of, 247, 248: *and see* **Things**.
——— *communes*, 226.
——— *consumtibiles*, 227: quasi-usufruct in, 260.
——— *corporales* and *incorporales*, 225.
——— *derelictae*, 238.
——— *divini juris*, 226.
——— *extra commercium*, 225: three classes of, 226 (*and see* 102): incapable of usucapio, 241.
Res *fungibiles*, defined, 228: an obligation to procure ownership in, is an obligatio dandi et certa, 285: the subject-matter of mutuum, 291 (*and see* 342 (1)): how dealt with on restoration of dos, 374.
——— *furtivae*, 242, **243**.
——— *in commercio*, 227, 228.
——— *inhabiles*, 242.
——— *mancipi* and *nec mancipi*, 42, 229, 230: the former could only be fully acquired by acquisitiones civiles, 232.
——— *nullius*, 227.
——— *omnium communes*, 226.
——— *quae pondere numero mensurave constant*, *see above* **Res** *fungibiles*.
——— *publicae*, 226 (*and see* 102).
——— *religiosae*, 226 (*and see* 109).
——— *sacrae*, 226 (*and see* 102, 103).
——— *sanctae*, 226.
——— *uxoria*, dos was substantially, 372, 374, 379.
——— *vi possessae*, 242, **243**.
Rescript, action by, 221 (2).
Rescripta principis, 76: in the later empire, take the place of responsa, 71: on delegating a case to a judex delegatus, 221 (2).
Resolutive condition, *see* **Condition**.
Responsa, pontifical, 62: Augustus orders all, to be given ex auctoritate principis, 63: responsa prudentium, 63, 64: the authority of, is extended to the literature of responsa, 64: superseded by the rescripta principis, 71: *see also* **Jus respondendi**.
Restipulatio, proceedings by sponsio and, 215.
Restituere, meaning of, 195 (4).
Restitutio in integrum, 217–220: nature of, 217: restitutio minorum, 218, 219: restitutio majorum, 219, 220: propter absentiam, 219 (edict on, 58): propter dolum, 136, 219: propter metum, 136, 219: propter errorem, 219: in relief of creditors against civil law effects of capitis deminutio minima, 125, 354, 387 (2).
Retainer, husband's rights of, on dissolution of marriage, 375, 376, 378.
Retentio, or lien, 203.
Revocation, of gifts, 138.
Right, distinguished from Law, 17, 18: real and obligatory right, 98, 185: of way, 262.
Robbery, *see* **Rapina**.
Roman civil procedure, 148–152:

authorities on, 148 (1): division into proceedings in jure and in judicio, 149: principle of the division, 151: early, a form of regulated self-help, 162 (17): in the later empire, 220–224: *and see* **Formulary procedure**; **Legis actio.**

Roman jurisprudence, *see* **Jurisprudence.**

——— **law**, reception of, in Germany, 1, 2: relation of, to the law of modern Germany, 3–5: history of, as a branch of legal study, 6: sources of, 8–10: permanent value of, 73, 74, 96.

Royal laws, 28 (2).

Rupitiae, 326 (4).

Ruptio testamenti, 464.

S.

Sabinians, *see* **Jurisprudence**, *Roman.*

Sabinus, Masurius, 64: position of, 67: chief work of, 68: writings of, in the compilation of the Digest, 88.

Sacramento legis actio, *see* **Legis actio.**

——— **provocare**, 161 (16).

Sacramentum, meaning of, in the L.A. sacramento, 153, 154 (2): meaning of, in Low Latin, 67 (8).

Sale, *see* **Emtio venditio**; **Mancipatio.**

Sarcire, duty to, under the XII Tables, 326 (4).

Satisfaction of creditor, extinguishes an obligation, 345, 346.

Saxon Civil Code, 4, 5.

Scaevola, Q. Cervidius, 70.

——— **Q. Mucius**, 60 (2), 61, **62.**

Schools of law, *see* **Jurisprudence**, *Roman.*

Second marriages, 384.

Secret representation, 146.

——— **societies**, 67, end of *n.* 8.

Security, *see* **Cautio.**

Self-defence, 147, 148.

Self-denunciation, in sponsio, 38 (13).

Self-help, 147, 148: decree of Marcus on, 77 (2), 148: early civil procedure a form of regulated, 162 (17).

Self-pledge, the underlying idea of nexum and stipulatio, 38.

Semel heres semper heres, 459.

Semisses usurae, 298.

Senate, authority of, during the republic, 77: exercises an independent legislative power under the empire, 78.

Senatusconsultum, Gajus' definition of, 78: takes the place of the popular statute, 78.

Senatusconsultum *Juvencianum*, 471.

——— *Macedonianum*, 292: mode of operation of, 55 (11): exceptio founded on, 200.

——— *Neronianum*, 474, **476.**

——— *Orphitianum*, 442.

——— *Pegasianum*, mode of operation of, 199 (7): extends the quarta Falcidia to fideicommissa, 480, 483, **484**: other provisions of, 483, **485**: consolidated with the SC. Trebellianum by Justinian, 483.

——— *Tertullianum*, 442.

——— *Trebellianum*, mode of operation of, 55 (11) (*see Errata*), 199 (7): provision of, 482, **484**: consolidated with the SC. Pegasianum by Justinian 483, **485.**

——— *Vellejanum*, 300: mode of operation of, 55 (11), 199: exceptio founded on, 199.

Sententia, meaning of, in Roman civil procedure, 150: distinguished from decretum, 151, 152, 212: the difference ceases to exist in the later empire, 222.

Separate property of married women, *see* **Husband and Wife.**

Separatio bonorum, 469.

Servitude, 258–268: object of, 258: definition of, 259: either personal or real (praedial), 259: personal servitudes named, 259–261: praedial, 262: a praedial, is either rural or urban (servitutes praediorum rusticorum, urbanorum), 262: a rural, in Italy is a res mancipi, 230: rights of the person entitled to a, 262: duty of owner of res serviens, 263: how acquired, 263–265 (civil modes, 263, 264, 473, praetorian mode, 264, 265, other modes, 265): extinction of, 265, 266: capitis deminutio minima extinguished a personal, till Justinian, 125: actions in respect of, 267, 268: quasi-possession of, 267: *and see next word.*

Servitus *actus, itineris, viae*, 262, **263.**

——— *altius non tollendi*, 262, **263.**

——— *aquae hauriendae*, 262.

——— *aquaeductus*, 262, **263.**

——— *ne luminibus officiatur*, 262.

——— *stillicidii*, 262, **263.**

——— *tigni immittendi*, 262, **263.**

Servius Tullius, supposed laws by, 28 (2).

Servus, *see* **Slave.**
——— **poenae**, 110.
Set-off, *see* **Compensatio.**
Severus, Septimius, jurist and emperor, 70: on slaves, **109**: oratio on the property of wards, 403, **404** (*see also* 78 (6)).
Shipowners, 318, 331.
Silence, may amount to an expression of the will, 134 (3).
Singular succession, *see* **Succession.**
Slave, Slavery, a slave not a person, 108: but for some purposes has a natural personality, *ibid.*: his will and faculties operate for the benefit of his master, 108, 109: the master's dominica potestas, 109: enactments protecting slaves, 109: his position in the jus sacrum, *ibid.*: how slavery may originate, 109, 110: a slave becomes free by **Manumission** (q.v.), 110, 111: relationships akin to slavery, 115, 116: involuntary representation by a slave, 146: cannot legally marry, *see* **Contubernium**: liability of master for slave's delicts, 331 (*and see* 191, 194), and contracts, 335–337: a res mancipi, 230: slave may be instituted heir (cum libertate), 417.
Sobrinus, who is, 440.
Social war, the, 118.
Societas, or partnership, a consensual contract, 313, 314.
Societies, *see next word.*
Sodalitates (Societies), gradually acquire proprietary capacity, 102, 103.
Solarium, 271.
Soldier, privileges of a filiusfamilias in his capacity of, *see* **Bona castrensia**: wills by, in line of battle, 450: valid without any formality, 457: exempt from rule as to partial intestacy, 448.
Solidary obligation, 281, 282, 283: *see* **Correal obligation.**
Solutio, or performance, extinguishes an obligation, 345, 346: imaginaria, by acceptilatio, 341, **343, 344.**
——— **indebiti**, 315.
Solutionis causa adjectus, 345.
Sources of Roman law, *see* **Roman law.**
Specificatio, an original mode of acquisition, 245, **246**: Justinian's enactment on, *ibid.*: is a kind of union of things, 247: distinguished from accessio, 248.
Sponsalia, 364.
Sponsio, original nature of, 38 (13): processual sponsio (procedure by sponsio, agere per sponsionem), 49, 176: praejudicialis, 176: poenalis, 176 (3): sponsio and restipulatio in the interdict procedure, 215: passes into the **Stipulatio** (q. v), 290: originally only created a moral obligation, 296 (1) (*and see* 364): as a form of suretyship, 298 (2).
Sponsor, a kind of surety, 299 (2).
Stablekeepers, Stabularii, 318, 331.
Statu liber, who is, 115.
Status, 108: three kinds of, 108: loss of, 122: rights of, 186: actions on, how tried, 186: actio de statu defuncti barred in five years, 206 (1), 466.
Statute law, opposed to customary law, 16: absolutely binding on the magistrate, 28.
Statutory guardianship, 400: *see* **Tutela** *legitima.*
——— **share**, in the law of inheritance, meaning of, 462: who entitled to, 465: amount of, before Justinian, 466, under Justinian, 467: how required to be given, *ibid.*: effect of not giving, before Justinian, *ibid.*, under Justinian, 467.
Stipulatio, 296–304: the outcome of sponsio, 38, 290: how it arises (form of), 296, 297, **304**: employed either to originate an obligation, 297–300 (stipulatio to pay interest, 297, 298, to pay a penalty, 298, creating a suretyship, 298, 299), or to transform (novate) an obligation, 300–302, 346 (*see* **Novation**): a negotium stricti juris, 286, 302: remedies on, *ibid.*: extinction of, 342, 343, 347, 348: stipulatio onerandae libertatis causa, **113**: of betrothal, 296 (1), 364: for money to be paid after stipulator's death (change by Justinian), 303, **304**: in proceedings for damnum infectum, 172 (9): on the sale of an inheritance, 481 (*and see* the **SC.** *Trebellianum* and *Pegasianum*): *see also* **Adstipulator; Adpromissor: Correal obligation.**
——— **Aquiliana**, 343, **344.**
Stipulationes partis et pro parte, 482 (1), 483.
Stoic philosophy, influence on Roman jurisprudence, 60.
Strict marriages, *see* **Marriage; Manus.**
Stricti juris actiones, negotia, *see sub verbis* **Actiones; Negotia.**

Subscriptio, a form of rescript, 76 : to a will, 456.
Substitution, what it is, 459 : simple (vulgaris) and pupillary, 461 ([4]) : pupillary substitutions remain in force in spite of praeteritio, 464.
Successio graduum, meaning of, 437 : not recognized by the early civil law, 430 : partially compensated for by in jure cessio hereditatis, 418 ([3]) : recognized by the praetor as between cognati, 441 : in the 118th Novel, 445.
——— **in capita and in stirpes**, explained, 443 : how applied in the four classes under the 118th Novel, 443, 444, 445.
——— **ordinum**, meaning of, 437 : not recognized by the early civil law, 430, **438** : recognized by the praetor, 441 (*see* 432, 438) : in the 118th Novel, 445.
Succession, hereditary, foundation and conception of, 408–413 ; three kinds of, **intestate** (q. v.), **testamentary** (q. v.), and succession by necessity, 409 : order of precedence between, 413 : testate and intestate, mutually exclusive, 414 : universal and singular succession, 410, 411, 412 : universal succession within the meaning of the Roman law of inheritance defined, 411 : is strictly a continuation, 412 : effect of, in transmitting debts, 411, 413 : *see also* **Fideicommissum**, *universal.*
——— **by necessity**, meaning of, 409 : rules of, bear witness to what, in the old law and later law respectively, *ibid.* : overrides testamentary succession as a ground of delatio, 413 : earliest law of, 460, 461 : formal law of, 462–465 (by civil law, 462–464 : by praetorian law, 464, 465) : material law of, 465, 466 : fusion of the formal and material law of, by Justinian, 467, 468.
Sui heredes, *see* **Heres** *domesticus.*
Sui juris, homo, 120.
Superficies, 270, 271.
Superscriptio, 455 ([8]).
Suretyship, *see* **Fidejussio.**
Suspecti accusatio, 407.
Suspensive condition, *see* **Condition.**
Syrio-Roman Book of Law, 87 ([3a]).
System, of law, what it is, 22 : of private law, 98–100.

T.

Tabulae testamenti, in the civil law, 450 : in the praetorian law, 454.
Tacit manifestation of the will, 134 ([3]).
Tempus ad deliberandum, 419 ([4]).
——— **continuum**, 207 (*see* **Cretio** continua).
——— **utile**, 207, **208.**
Testamentary guardianship, 400.
——— **succession**, 448 ff. : not known in the earliest law, 409 : rules of, bear witness to the rights of the individual, *ibid.* : operates a delatio hereditatis, 413 : testamentary and intestate succession mutually exclusive, 414 : *and see* **Wills.**
Testamenti factio *activa*, who has, 448, 449.
——— *passiva*, 449 : under Justinian, 458, 459.
——— (in the sense of being competent to witness a will), 456 ([9]), **458.**
Testamentum, *see* **Wills.**
——— *apud acta conditum*, 457.
——— *caeci*, 457.
——— *calatis comitiis*, 449, **453.**
——— *in procinctu*, 450, **453.**
——— *inofficiosum*, *see* **Querela**, etc.
——— *militis*, 457 : *and see* **Soldier.**
——— *parentis inter liberos*, 457.
——— *per aes et libram* (mancipatory will), 450–454 : form and object of, 450 : contrasted with fiducia, 451 : passed from a will for giving bequests only into a will operating a universal succession, 452, 453.
——— *pestis tempore*, 457.
——— *principi oblatum*, 457.
——— *ruri conditum*, 457.
Testari, real meaning of, 452 ([7]).
Theodoric the Great, Edict of, 92.
Theodosius, code of, *see* **Codex Theodosianus** : as to limitation of actions, 206, 207 : law on dos promised by a third party, 373 : on children's right to succeed to their maternal ascendants, 442.
Theophilus, 87.
Theft, *see* **Furtum.**
Thesaurus, 238.
Thing, *see* **Res.**
Things, *consumable*, *see* **Res** *consumtibiles.*
——— *divisible* and *indivisible*, 228.
——— law of, 225 ff. : place of, in the legal system, 99.

Tiberius Coruncanius, 60, 62.
Title, civil and natural, *see* **Ownership**.
Titulus putativus, 241 (1).
Traditio, defined, 234: an acquisitio naturalis, 232: a derivative mode of acquisition, *ibid.*: a 'causa traditionis' and transfer of possession required to pass ownership by, 235: distinguished from bare delivery, *ibid.*: ownership in res nec mancipi formerly passed by, 42: application of the rule in the XII Tables as to sales to, 25 (2), 42: a fiducia could not be concluded by, 37 (12): no deductio possible in, 264 (1).
——— **brevi manu**, 234.
Tralaticium edictum, 51.
Transactio, pleaded by way of exceptio, 198: *and see* **Compromise**.
Transfer, of hereditas legitima, 418 (3): of a share of an inheritance, 481: of an inheritance under a universal fideicommissum, 482, 483: of an obligation, *see* **Obligatio**.
Transmissibility, 209: active and passive, meaning of, 329 (*and see* 377, 409).
Transmission of liabilities, importance of the question of, in the law of inheritance, 410, 411, 413.
Transscriptio, a persona, a re, in personam, 307, **309**.
Treasure trove, 238.
Treasury, *see* **Aerarium**.
Tres partes, 12.
Tribonian, 87, 88.
Tribunes, right of, to be consulted under the lex Atilia, 400.
Tribus urbanae and rusticae, 112.
Trientes usurae, 298.
Trinoctium, 362.
Triplicatio, in pleading, 204.
Trusts, *see* **Fiducia**: trust-clause in fiducia and mancipatory will distinguished, 451: *see also* **Fideicommissum**.
Turpitudo, 128.
Tutela, 395 ff.: a form of guardianship, 395: distinguished from cura, 395, 396: essence of, is auctoritatis interpositio, *ibid.*: two cases of, tutela impuberum and mulierum (*see infra*), 396: devolves on a person in three ways, 399, 400: creates a quasi-contractual liability to the ward, 319: *and see* **Guardians**; **Guardianship**; **Tutor**.
Tutela *cessicia*, 398 (2).
——— *dativa*, 400, 401.
——— *impuberum*, position of tutor in, according as the ward is infantia minor or major, 141, 142, 396, 397.
——— *legitima*, on whom it devolves, 400.
——— *legitima mulierum*, three forms of, 398 (2): assignable by in jure cessio, 32 (4), 398 (2): loses all practical importance in consequence of the lex Claudia, 398.
——— *mulierum* (*see preceding word*), 397, 398, **399**: women freed from, by the jus liberorum, 384.
——— *testamentaria*, 400: appointments of testamentary guardians not prejudiced by praeteritio, 464.
Tutelary representation, 145.
Tutor *Atilianus*, 400.
——— *ex lege Julia et Titia*, 400.
——— *fiduciarius*, 398 (2).
——— *gerens* and *honorarius*, powers of, 404: duties of, 405. *See further s. v.* **Tutela**.
Tutoris postulatio, 401.
Twelve Tables, the, first codification of the jus civile, 24: characteristics of the law of the, *ibid.*: the chief juristic acts in, 24–27: why the legislation of the, successful, 28: remained formally in force till Justinian, 29, 81: interpretation of, *see* **Interpretatio**: on mancipatio, 25: on giving security for the price in a sale, 25 (2): on personal execution (manus injectio), 27: on confessio in jure, 30: on sale of children into bondage (penal provision), 32, 387, 389 (*see* 393): on the force of the nuncupatio in nexum and mancipatio, 33, 34 (*see also* 451): on the liability of a vendor to an actio auctoritatis, 33 (7): on the effect of infamy, 127 (1); on arbores succisae, 155 (3), 164: on in jus vocatio, 157 (9): on the vindicatio of a person under arrest, 158 (11): on the period of usucapio, 240: on usucapio of res furtivae, 242: on the rate of interest, 298; on damage to property, 326 (4): on injuria, 328: on usurpatio (by trinoctium), 362: on tutela, 398 (2): on testamentary guardianship, **401**: on the cura of prodigi and furiosi, **401**: on **Intestate succession**, q.v.

U.

Ulpian, 71: writings of, form the groundwork of the Digest, 71: writings of, in the Law of Citations, 84.
Unciarium foenus, 298.
Unde vi, interdictum, 255, 256.
Undisclosed principal, 146.
Unduteous will, 465: *see* **Querela**, etc.
Unger, on correality and solidarity, 282 (7).
Unions of things, 247, 248: union, in the narrower sense, defined, 247.
Unitas actus, required in the execution of a will, 456.
Universal fideicommissa, *see* **Fideicommissum**, *universal*.
——— **succession**, *see* **Succession**.
Universitates, acquire proprietary capacity, 103.
Unworthiness, causes an inheritance to divest, 472.
Usucapio, 239–243: a civil mode of acquisition, 232: nature and purpose of, 239: rules of the XII Tables on, 240: longi temporis possessio (praescriptio), *ibid.*: changes by Justinian, 241, **243**: requirements of justus titulus and bona fides, *ibid.*: what things incapable of, 241, 242: Justinian's extraordinary usucapio, 242: twofold function of, in the classical law, *ibid.*: function of, in Justinian's law, 243; usucapio of servitudes, 265: usucapio libertatis, 266.
——— **possession**, protection of (actio Publiciana), 248–251: of an intended wife in the older law, 362, 363.
——— **pro herede**, does not require bona fides, 241 (1), 424: supposed to contain the germ of bonorum possessio, 424, 425: excluded by the existence of sui heredes, 426 (4): interrupted by cretio, 428 (9): purpose of, 431: attitude of praetor towards, 432: enactment making, inoperative as against an hereditatis petitio, 470.
Usufruct, *see* **Usufructus**.
Usurae, 298.
Usureceptio ex fiducia, 37 (12), 241 (1).
Usurpatio, 362, 363.
Usus (a servitude), 260, **261**: *see also* **Servitude** (personal).
——— (a mode of creating manus), 361, 362, 363: marriage by, not introduced by the XII Tables, 362: marriage by, how dissolved, 381.
Usufructus, 260, **261**: the right itself inalienable, 260, 374 (2): of father in son's bona adventicia, 121, 392: *and see* **Servitude** (personal).
Uterini, who are, 358.
Uti lingua nuncupassit ita jus esto, 32, 35, 263 (1), 291, 451.
Uti possidetis, interdictum, 253–255.
Utrubi, interdictum, 254 (1).
Uxor, distinguished from materfamilias, 363: uxor in manu one of her husband's sui heredes, 370, 416, and one of the praetorian liberi, 438: *and see* **Wife**.

V.

Vadimonium, served as a suretyship in the oldest times, 298 (2): whether admitted to same effect as payment of price in the XII Tables, 25 (2).
Valentinian II, enactment on intestate succession, 442.
——— **III**, his Law of Citations, 84, 85.
Vas, *see* **Vadimonium**.
Vaticana fragmenta, 86 (2).
Vectigal, 269.
Venditio bonorum, 211 (*see* 351).
——— **sub hasta**, 232.
Verbal contract, 288: *see* **Stipulatio**.
Vespasian, confers the Latinitas on Spain, 118.
Vestalis, virgo, a daughter becoming, freed from patria potestas, 393.
Vexatious denial, of liability, effect of, 327 (*see also* 158).
Vieh-Eid, 154 (2).
Vim vi repellere licet, 147.
Vindex, in the L. A. per manus injectionem, 158.
Vindicatio caducorum, 385.
——— **filii** (in potestatem), 186, 390 (*see also* 32, 387, 393).
——— **in libertatem**, for effecting a manumission, 31, 110: of a person under arrest, 289 (*and see* 158): tried by recuperatores, 150 (3): *see also* **Emancipation**.
——— **rei**, a real action, 186: for protecting ownership, 248, 249: difficulties of a mere pecuniary condemnation in connection with, 189: utilis, by emphyteuta, 269.
Vindicias dare, meaning of, 162, 423: effect of, 423.

Vis *absoluta* (*atrox*), 135.
——— *compulsiva*, 135.
——— *major*, 318.
Vitiosa possessio, 256.
Vocatio, in jus, 157 (9).
Voigt, on literal obligations, 308 (1).
Voluntary jurisdiction, defined, 172.
Vulgaris substitutio, *see* **Substitutio.**

W.

Ward, a minor, *see* **Minor**: a woman, *see* **Tutela** *mulierum*: a lunatic, *see* **Furiosus**: a prodigal, *see* **Prodigus**: remedy of, against guardian, 319, 405, 406: *and see* **Guardians, Guardianship.**
Way, rights of, 262.
Whole blood, collaterals of the, *see* **Collateral relations.**
Widow, may not remarry within a year, 384, on pain of certain disadvantages, 384, 472: may sometimes apply for tutela of children, 402: claims of, against husband's estate, 370, 445: right of succession to husband, *see* **Husband and wife.**
Wife, separate property of, 370: cautio rei uxoriae, 375: privileged hypothec of, 378, 380: *and see* **Dos; Husband and Wife; Marriage.**
Wild animals, 227, 237.
Will, the, and its expression in juristic acts, 133, 134.
Wills, develop with the idea of private ownership, 409 (*see* **Testamentary succession**): probable origin in the practice of adoption, 414, 449: must be in respect of testator's entire estate, 414: who can make a will, *see* **Testamenti factio** *activa*: who can take under a will, *see* **Incapacity**: general rules concerning, 448: in the early civil law, 449–454: development of the mancipatory will, 450–453: in the praetorian law, 454–456: a will becomes a unilateral instead of a bilateral act, 455: in Justinian's law, 456–460 (ordinary form of will, jus tripartitum, 456: special forms, 457: rules on institution, 458, 459, 460): original idea of, 460: limited power of making, *ibid.*: development of complete liberty of testation, 461: liberty of testation in the XII Tables, 480: power of filiusfamilias to dispose of peculium castrense and quasi-castrense by will, 391, but not of adventicia, 392: effect of praeteritio on, *see* **Praeteritio**: effect of a successful querela inofficiosi testamenti, before Justinian, 466, under Justinian, 467, 468: of soldiers, *see* **Soldier**: manumission by will, *see* **Manumissio**: of cives dying in captivity, 123: *and see* **Testamentum.**
Witness, to a will, who cannot be, 456 (9), 458.
Women, guardianship of, *see* **Tutela** *mulierum*: incapable of intercessio, 300: no arrogatio of, 386: cannot adopt, 388: formerly required tutor's consent to make a will, 398 (2), 449: restriction on rights of, to take under wills, 437 (1): cannot witness a will, 456 (9).

Z.

Zeno, on premature actions, 205: on emphyteusis, 269.

THE END.

Clarendon Press, Oxford.

SELECT LIST OF STANDARD WORKS.

DICTIONARIES . . . . . page 1
LAW . . . . . „ 2
HISTORY, BIOGRAPHY, ETC. . . . „ 3
PHILOSOPHY, LOGIC, ETC. . . . . „ 6
PHYSICAL SCIENCE . . . . . „ 7

1. DICTIONARIES.

A New English Dictionary on Historical Principles, founded mainly on the materials collected by the Philological Society. Edited by James A. H. Murray, LL.D., and H. Bradley, M.A. Imperial 4to.

Vol. I, A and B, and Vol. II, C, half-morocco, *2l.* 12*s.* 6*d.* each.
Vol. III, D and E.
D. Edited by Dr. Murray. [*In the Press.*]
E. Edited by Henry Bradley, M.A.
E—EVERY, 12*s.* 6*d.* [*Published.*]
EVERYBODY—EZOD, 5*s.* [*Published.*]

An Etymological Dictionary of the English Language, arranged on an Historical Basis. By W. W. Skeat, Litt.D. *Second Edition.* 4to. *2l.* 4*s.*

A Middle-English Dictionary. By F. H. Stratmann. A new edition, by H. Bradley, M.A. 4to, half-bound, *1l.* 11*s.* 6*d.*

An Anglo-Saxon Dictionary, based on the MS. collections of the late Joseph Bosworth, D.D. Edited and enlarged by Prof. T. N. Toller, M.A. Parts I–III. A–SÁR. 4to, stiff covers, 15*s.* each. Part IV, § 1, SÁR–SWÍÐRIAN. Stiff covers, 8*s.* 6*d.*

An Icelandic-English Dictionary, based on the MS. collections of the late Richard Cleasby. Enlarged and completed by G. Vigfússon, M.A. 4to. *3l.* 7*s.*

A Greek-English Lexicon, by H. G. Liddell, D.D., and Robert Scott, D.D. *Seventh Edition, Revised and Augmented.* 4to. *1l.* 16*s.*

A Latin Dictionary. By Charlton T. Lewis, Ph.D., and Charles Short, LL.D. 4to. *1l.* 5*s.*

Oxford: Clarendon Press. London: Henry Frowde, Amen Corner, E.C.

A Sanskrit-English Dictionary. Etymologically and Philologically arranged. By Sir M. Monier-Williams, D.C.L. 4to. 4*l.* 14*s.* 6*d.*

A Hebrew and English Lexicon of the Old Testament, with an Appendix containing the Biblical Aramaic, based on the Thesaurus and Lexicon of Gesenius, by Francis Brown, D.D., S. R. Driver, D.D., and C. A. Briggs, D.D. Parts I–III. Small 4to, 2*s.* 6*d.* each.

Thesaurus Syriacus: collegerunt Quatremère, Bernstein, Lorsbach, Arnoldi, Agrell, Field, Roediger: edidit R. Payne Smith, S.T.P. Vol. I, containing Fasc. I–V, sm. fol. 5*l.* 5*s.*
Fasc. VI. 1*l.* 1*s.*; VII. 1*l.* 11*s.* 6*d.*; VIII. 1*l.* 16*s.*; IX. 1*l.* 5*s.*

2. LAW.

Anson. *Principles of the English Law of Contract, and of Agency in its Relation to Contract.* By Sir W. R. Anson, D.C.L. *Seventh Edition.* 8vo. 10*s.* 6*d.*

—— *Law and Custom of the Constitution.* 2 vols. 8vo.
Part I. Parliament. *Second Edition.* 12*s.* 6*d.*
Part II. The Crown. 14*s.*

Baden-Powell. *Land-Systems of British India;* being a Manual of the Land-Tenures, and of the Systems of Land-Revenue Administration prevalent in the several Provinces. By B. H. Baden-Powell, C.I.E. 3 vols. 8vo. 3*l.* 3*s.*

—— *Land-Revenue and Tenure in British India.* By the same Author. With Map. Crown 8vo, 5*s.*

Digby. *An Introduction to the History of the Law of Real Property.* By Kenelm E. Digby, M.A. *Fourth Edition.* 8vo. 12*s.* 6*d.*

Greenidge. *Infamia; its place in Roman Public and Private Law.* By A. H. J. Greenidge, M.A. 8vo. 10*s.* 6*d.*

Grueber. *Lex Aquilia.* The Roman Law of Damage to Property: being a Commentary on the Title of the Digest 'Ad Legem Aquiliam' (ix. 2). By Erwin Grueber, Dr. Jur., M.A. 8vo. 10*s.* 6*d.*

Hall. *International Law.* By W. E. Hall, M.A. *Third Edition.* 8vo. 22*s.* 6*d.*

—— *A Treatise on the Foreign Powers and Jurisdiction of the British Crown.* By W. E. Hall, M.A. 8vo. 10*s.* 6*d.*

Holland and Shadwell. *Select Titles from the Digest of Justinian.* By T. E. Holland, D.C.L., and C. L. Shadwell, B.C.L. 8vo. 14*s.*

Also sold in Parts, in paper covers:—
Part I. Introductory Titles. 2*s.* 6*d.*
Part II. Family Law. 1*s.*
Part III. Property Law. 2*s.* 6*d.*
Part IV. Law of Obligations (No. 1). 3*s.* 6*d.* (No. 2). 4*s.* 6*d.*

Holland. *Elements of Jurisprudence.* By T. E. Holland, D.C.L. *Sixth Edition.* 8vo. 10*s.* 6*d.*

Holland. *The European Concert in the Eastern Question;* a Collection of Treaties and other Public Acts. Edited, with Introductions and Notes, by T. E. Holland, D.C.L. 8vo. 12*s.* 6*d.*

—— *Gentilis, Alberici, De Iure Belli Libri Tres.* Edidit T. E. Holland, I.C.D. Small 4to, half-morocco, 21*s.*

—— *The Institutes of Justinian,* edited as a recension of the Institutes of Gaius, by T. E. Holland, D.C.L. *Second Edition.* Extra fcap. 8vo. 5*s.*

Markby. *Elements of Law considered with reference to Principles of General Jurisprudence.* By Sir William Markby, D.C.L. *Fourth Edition.* 8vo. 12*s.* 6*d.*

Moyle. *Imperatoris Justiniani Institutionum Libri Quattuor;* with Introductions, Commentary, Excursus and Translation. By J. B. Moyle, D.C.L. *Second Edition.* 2 vols. 8vo. Vol. I. 16*s.* Vol. II. 6*s.*

—— *Contract of Sale in the Civil Law.* By J. B. Moyle, D.C.L. 8vo. 10*s.* 6*d.*

Pollock and Wright. *An Essay on Possession in the Common Law.* By F. Pollock, M.A., and R. S. Wright, B.C.L. 8vo. 8*s.* 6*d.*

Poste. *Gaii Institutionum Juris Civilis Commentarii Quattuor;* or, Elements of Roman Law by Gaius. With a Translation and Commentary by Edward Poste, M.A. *Third Edition.* 8vo. 18*s.*

Raleigh. *An Outline of the Law of Property.* By Thos. Raleigh, M.A. 8vo. 7*s.* 6*d.*

Sohm. *Institutes of Roman Law.* By Rudolph Sohm, Professor in the University of Leipzig. Translated by J. C. Ledlie, B.C.L. With an Introductory Essay by Erwin Grueber, Dr. Jur., M.A. 8vo. 18*s.*

Stokes. *The Anglo-Indian Codes.* By Whitley Stokes, LL.D.

Vol. I. Substantive Law. 8vo. 30*s.*

Vol. II. Adjective Law. 8vo. 35*s.*

First and Second Supplements to the above, 1887–1891. 8vo. 6*s.* 6*d.*

Separately, No. 1, 2*s.* 6*d.*; No. 2, 4*s.* 6*d.*

3. HISTORY, BIOGRAPHY, ETC.

Arbuthnot. *The Life and Works of John Arbuthnot, M.D.* By George A. Aitken. 8vo, cloth, with portrait, 16*s.*

Bentham. *A Fragment on Government.* By Jeremy Bentham. Edited with an Introduction by F. C. Montague, M.A. 8vo. 7*s.* 6*d.*

Boswell's *Life of Samuel Johnson, LL.D.* Edited by G. Birkbeck Hill, D.C.L. In six volumes, medium 8vo. With Portraits and Facsimiles. Half-bound, 3*l.* 3*s.*

Carte's *Life of James Duke of Ormond.* 6 vols. 8vo. 1*l.* 5*s.*

London: Henry Frowde, Amen Corner, E.C.

Casaubon (Isaac). 1559–1614. By Mark Pattison. 8vo. 16*s.*

Clarendon's *History of the Rebellion and Civil Wars in England.* Re-edited from a fresh collation of the original MS. in the Bodleian Library, with marginal dates and occasional notes, by W. Dunn Macray, M.A., F.S.A. 6 vols. Crown 8vo. 2*l.* 5*s.*

Earle. *Handbook to the Land-Charters, and other Saxonic Documents.* By John Earle, M.A. Crown 8vo. 16*s.*

Finlay. *A History of Greece from its Conquest by the Romans to the present time,* B. C. 146 to A. D. 1864. By George Finlay, LL.D. A new Edition, edited by H. F. Tozer, M.A. 7 vols. 8vo. 3*l.* 10*s.*

Fortescue. *The Governance of England.* By Sir John Fortescue, Kt. A Revised Text. Edited, with Introduction, Notes, &c., by Charles Plummer, M.A. 8vo, half-bound, 12*s.* 6*d.*

Freeman. *The History of Sicily from the Earliest Times.*
Vols. I. and II. 8vo, cloth, 2*l.* 2*s.*
Vol. III. The Athenian and Carthaginian Invasions. 8vo, cloth, 24*s.*
Vol. IV. From the Tyranny of Dionysios to the Death of Agathoklês. Edited by Arthur J. Evans, M.A. 21*s.*

—— *History of the Norman Conquest of England; its Causes and Results.* By E. A. Freeman, D.C.L. In Six Volumes. 8vo. 5*l.* 9*s.* 6*d.*

—— *The Reign of William Rufus and the Accession of Henry the First.* 2 vols. 8vo. 1*l.* 16*s.*

French Revolutionary Speeches. (See Stephens, H. Morse.)

Gardiner. *The Constitutional Documents of the Puritan Revolution,* 1628–1660. Selected and Edited by Samuel Rawson Gardiner, M.A. Crown 8vo. 9*s.*

Greswell. *History of the Dominion of Canada.* By W. Parr Greswell, M.A. Crown 8vo. With Eleven Maps. 7*s.* 6*d.*

—— *Geography of the Dominion of Canada and Newfoundland.* Crown 8vo. With Ten Maps. 6*s.*

—— *Geography of Africa South of the Zambesi.* With Maps. Crown 8vo. 7*s.* 6*d.*

Gross. *The Gild Merchant;* a Contribution to British Municipal History. By Charles Gross, Ph.D. 2 vols. 8vo. 24*s.*

Hastings. *Hastings and the Rohilla War.* By Sir John Strachey, G.C.S.I. 8vo, cloth, 10*s.* 6*d.*

Hodgkin. *Italy and her Invaders.* With Plates and Maps. By T. Hodgkin, D.C.L. Vols. I–IV, A.D. 376–553. 8vo.
Vols. I. and II. *Second Edition.* 2*l.* 2*s.*
Vols. III. and IV. 1*l.* 16*s.*
Vols. V. and VI. *In the Press.*

—— *The Dynasty of Theodosius;* or, Seventy Years' Struggle with the Barbarians. By the same Author. Crown 8vo. 6*s.*

Hume. *Letters of David Hume to William Strahan.* Edited with Notes, Index, &c., by G. Birkbeck Hill, D.C.L. 8vo. 12*s.* 6*d.*

Johnson. *Letters of Samuel Johnson, LL.D.* Collected and edited by G. Birkbeck Hill, D.C.L., Editor of Boswell's 'Life of Johnson' (see Boswell). 2 vols. half-roan, 28*s.*

Kitchin. *A History of France.* With Numerous Maps, Plans, and Tables. By G. W. Kitchin, D.D. In three Volumes. *Second Edition.* Crown 8vo, each 10*s.* 6*d.*

Vol. I. to 1453. Vol. II. 1453–1624. Vol. III. 1624–1793.

Ludlow. *The Memoirs of Edmund Ludlow, Lieutenant-General of the Horse in the Army of the Commonwealth of England,* 1625–1672. Edited, with Appendices and Illustrative Documents, by C. H. Firth, M.A. 2 vols. 8vo. 1*l.* 16*s.*

Luttrell's (*Narcissus*) *Diary.* A Brief Historical Relation of State Affairs, 1678–1714. 6 vols. 1*l.* 4*s.*

Lucas. *Introduction to a Historical Geography of the British Colonies.* By C. P. Lucas, B.A. With Eight Maps. Crown 8vo. 4*s.* 6*d.*

—— *Historical Geography of the British Colonies:*

Vol. I. The Mediterranean and Eastern Colonies (exclusive of India). With Eleven Maps. Crown 8vo. 5*s.*

Vol. II. The West Indian Colonies. With Twelve Maps. Crown 8vo. 7*s.* 6*d.*

Vol. III. West Africa. With Five Maps. Crown 8vo. 7*s.* 6*d.*

Machiavelli. *Il Principe.* Edited by L. Arthur Burd, M.A. With an Introduction by Lord Acton. 8vo. Cloth, 14*s.*

Prothero. *Select Statutes and other Constitutional Documents, illustrative of the Reigns of Elizabeth and James I.* Edited by G. W. Prothero, Fellow of King's College, Cambridge. Crown 8vo. 10*s.* 6*d.*

Ralegh. *Sir Walter Ralegh.* A Biography. By W. Stebbing, M.A. 8vo. 10*s.* 6*d.*

Ramsay (Sir J. H.). *Lancaster and York.* A Century of English History (A.D. 1399–1485). By Sir J. H. Ramsay of Bamff, Bart., M.A. With Maps, Pedigrees, and Illustrations. 2 vols. 8vo. 36*s.*

Ranke. *A History of England, principally in the Seventeenth Century.* By L. von Ranke. Translated under the superintendence of G. W. Kitchin, D.D., and C. W. Boase, M.A. 6 vols. 8vo. 3*l.* 3*s.*

Rawlinson. *A Manual of Ancient History.* By George Rawlinson, M.A. *Second Edition.* 8vo. 14*s.*

Rhŷs. *Studies in the Arthurian Legend.* By John Rhŷs, M.A. 8vo. 12*s.* 6*d.*

Ricardo. *Letters of David Ricardo to T. R. Malthus* (1810–1823). Edited by James Bonar, M.A. 8vo. 10*s.* 6*d.*

Rogers. *History of Agriculture and Prices in England,* A.D. 1259–1702. By James E. Thorold Rogers, M.A. 6 vols., 8vo. 7*l.* 2*s.*

—— *First Nine Years of the Bank of England.* 8vo. 8*s.* 6*d.*

—— *Protests of the Lords, including those which have been expunged, from* 1624 *to* 1874; with Historical Introductions. In three volumes. 8vo. 2*l.* 2*s.*

Smith's *Wealth of Nations.* With Notes, by J. E. Thorold Rogers, M.A. 2 vols. 8vo. 21*s.*

London: Henry Frowde, Amen Corner, E.C.

Stephens. *The Principal Speeches of the Statesmen and Orators of the French Revolution*, 1789–1795. With Historical Introductions, Notes, and Index. By H. Morse Stephens. 2 vols. Crown 8vo. 21*s.*

Stubbs. *Select Charters and other Illustrations of English Constitutional History, from the Earliest Times to the Reign of Edward I.* Arranged and edited by W. Stubbs, D.D., Lord Bishop of Oxford. *Seventh Edition.* Crown 8vo. 8*s.* 6*d.*

—— *The Constitutional History of England, in its Origin and Development. Library Edition.* 3 vols. Demy 8vo. 2*l.* 8*s.*

Also in 3 vols. crown 8vo. price 12*s.* each.

Stubbs. *Seventeen Lectures on the Study of Medieval and Modern History.* Crown 8vo. 8*s.* 6*d.*

—— *Registrum Sacrum Anglicanum.* An attempt to exhibit the course of Episcopal Succession in England. By W. Stubbs, D.D. Small 4to. 8*s.* 6*d.*

Swift (F. D.). *The Life and Times of James the First of Aragon.* By F. D. Swift, B.A. 8vo. 12*s.* 6*d.*

Vinogradoff. *Villainage in England.* Essays in English Mediaeval History. By Paul Vinogradoff, Professor in the University of Moscow. 8vo, half-bound. 16*s.*

4. PHILOSOPHY, LOGIC, ETC.

Bacon. *The Essays.* With Introduction and Illustrative Notes. By S. H. Reynolds, M.A. 8vo, half-bound. 12*s.* 6*d.*

—— *Novum Organum.* Edited, with Introduction, Notes, &c., by T. Fowler, D.D. *Second Edition.* 8vo. 15*s.*

—— *Novum Organum.* Edited, with English Notes, by G. W. Kitchin, D.D. 8vo. 9*s.* 6*d.*

Berkeley. *The Works of George Berkeley, D.D., formerly Bishop of Cloyne; including many of his writings hitherto unpublished.* With Prefaces, Annotations, and an Account of his Life and Philosophy. By A. Campbell Fraser, Hon. D.C.L., LL.D. 4 vols. 8vo. 2*l.* 18*s.*

The Life, Letters, &c., separately, 16*s.*

Bosanquet. *Logic; or, the Morphology of Knowledge.* By B. Bosanquet, M.A. 8vo. 21*s.*

Butler's *Works, with Index to the Analogy.* 2 vols. 8vo. 11*s.*

Fowler. *The Elements of Deductive Logic, designed mainly for the use of Junior Students in the Universities.* By T. Fowler, D.D. *Ninth Edition*, with a Collection of Examples. Extra fcap. 8vo. 3*s.* 6*d.*

—— *The Elements of Inductive Logic, designed mainly for the use of Students in the Universities.* By the same Author. *Sixth Edition.* Extra fcap. 8vo. 6*s.*

Fowler and **Wilson.** *The Principles of Morals.* By T. Fowler, D.D., and J. M. Wilson, B.D. 8vo, cloth, 14*s.*

Green. *Prolegomena to Ethics.* By T. H. Green, M.A. Edited by A. C. Bradley, M.A. 8vo. 12*s.* 6*d.*

Hegel. *The Logic of Hegel.* Translated from the Encyclopaedia of the Philosophical Sciences. With Prolegomena to the Study of Hegel's Logic and Philosophy. By W. Wallace, M.A. *Second Edition, Revised and Augmented.* 2 vols. Crown 8vo. 10*s.* 6*d.* each.

Hegel's *Philosophy of Mind.* Translated from the Encyclopaedia of the Philosophical Sciences. With Five Introductory Essays. By William Wallace, M.A., LL.D. Crown 8vo. 10*s.* 6*d.*

Hume's *Treatise of Human Nature.* Edited, with Analytical Index, by L. A. Selby-Bigge, M.A. Crown 8vo. 9*s.*

Hume's *Enquiry concerning the Human Understanding, and an Enquiry concerning the Principles of Morals.* Edited by L. A. Selby-Bigge, M.A. Crown 8vo. 7*s.* 6*d.*

Locke. *An Essay Concerning Human Understanding.* By John Locke. Collated and Annotated, with Prolegomena, Biographical, Critical, and Historic, by A. Campbell Fraser, Hon. D.C.L., LL.D. 2 vols. 8vo. 1*l.* 12*s.*

Lotze's *Logic,* in Three Books; of Thought, of Investigation, and of Knowledge. English Translation; Edited by B. Bosanquet, M.A. *Second Edition.* 2 vols. Cr. 8vo. 12*s.*

—— *Metaphysic,* in Three Books; Ontology, Cosmology, and Psychology. English Translation; Edited by B. Bosanquet, M.A. *Second Edition.* 2 vols. Cr. 8vo. 12*s.*

Martineau. *Types of Ethical Theory.* By James Martineau, D.D. *Third Edition.* 2 vols. Cr. 8vo. 15*s.*

—— *A Study of Religion: its Sources and Contents. Second Edition.* 2 vols. Cr. 8vo. 15*s.*

5. PHYSICAL SCIENCE.

Chambers. *A Handbook of Descriptive and Practical Astronomy.* By G. F. Chambers, F.R.A.S. *Fourth Edition,* in 3 vols. Demy 8vo.

Vol. I. The Sun, Planets, and Comets. 21*s.*

Vol. II. Instruments and Practical Astronomy. 21*s.*

Vol. III. The Starry Heavens. 14*s.*

De Bary. *Comparative Anatomy of the Vegetative Organs of the Phanerogams and Ferns.* By Dr. A. de Bary. Translated by F. O. Bower, M.A., and D. H. Scott, M.A. Royal 8vo. 1*l.* 2*s.* 6*d.*

—— *Comparative Morphology and Biology of Fungi, Mycetozoa and Bacteria.* By Dr. A. de Bary. Translated by H. E. F. Garnsey, M.A. Revised by Isaac Bayley Balfour, M.A., M.D., F.R.S. Royal 8vo, half-morocco, 1*l.* 2*s.* 6*d.*

De Bary. *Lectures on Bacteria.* By Dr. A. de Bary. *Second Improved Edition.* Translated by H. E. F. Garnsey, M.A. Revised by Isaac Bayley Balfour, M.A., M.D., F.R.S. Crown 8vo. 6*s.*

Goebel. *Outlines of Classification and Special Morphology of Plants.* By Dr. K. Goebel. Translated by H. E. F. Garnsey, M.A. Revised by Isaac Bayley Balfour, M.A., M.D., F.R.S. Royal 8vo, half-morocco, 1*l.* 1*s.*

London: HENRY FROWDE, Amen Corner, E.C.

Sachs. *Lectures on the Physiology of Plants.* By Julius von Sachs. Translated by H. Marshall Ward, M.A., F.L.S. Royal 8vo, half-morocco, 1*l.* 11*s.* 6*d.*

—— *A History of Botany.* Translated by H. E. F. Garnsey, M.A. Revised by I. Bayley Balfour, M.A., M.D., F.R.S. Crown 8vo. 10*s.*

Fossil Botany. *Being an Introduction to Palaeophytology from the Standpoint of the Botanist.* By H. Graf zu Solms-Laubach. Translated by H. E. F. Garnsey, M.A. Revised by I. Bayley Balfour, M.A., M.D., F.R.S. Royal 8vo, half-morocco, 18*s.*

Annals of Botany. Edited by Isaac Bayley Balfour, M.A., M.D., F.R.S., Sydney H. Vines, D.Sc., F.R.S., D. H. Scott, M.A., Ph.D., F.L.S., and W. G. Farlow, M.D.; assisted by other Botanists. Royal 8vo, half-morocco, gilt top.

Vol. I. Parts I–IV. 1*l.* 16*s.*
Vol. II. Parts V–VIII. 2*l.* 2*s.*
Vol. III. Parts IX–XII. 2*l.* 12*s.* 6*d.*
Vol. IV. Parts XIII–XVI. 2*l.* 5*s.*
Vol. V. Parts XVII–XX. 2*l.* 10*s.*
Vol. VI. Parts XXI–XXIV. 2*l.* 4*s.*
Vol. VII. Parts XXV–XXVIII. 2*l.* 10*s.*
Vol. VIII. Parts XXIX, XXX. 12*s.* each.

Biological Series.

I. *The Physiology of Nerve, of Muscle, and of the Electrical Organ.* Edited by J. Burdon Sanderson, M.D., F.R.SS. L.&E. Medium 8vo. 1*l.* 1*s.*

II. *The Anatomy of the Frog.* By Dr. Alexander Ecker, Professor in the University of Freiburg. Translated, with numerous Annotations and Additions, by G. Haslam, M.D. Med. 8vo. 21*s.*

IV. *Essays upon Heredity and Kindred Biological Problems.* By Dr. A. Weismann. Vol. I. Translated and Edited by E. B. Poulton, M.A., S. Schönland, Ph.D., and A. E. Shipley, M.A. *Second Edition.* Crown 8vo. 7*s.* 6*d.*

——Vol. II. Edited by E. B. Poulton, and A. E. Shipley. Crown 8vo. 5*s.*

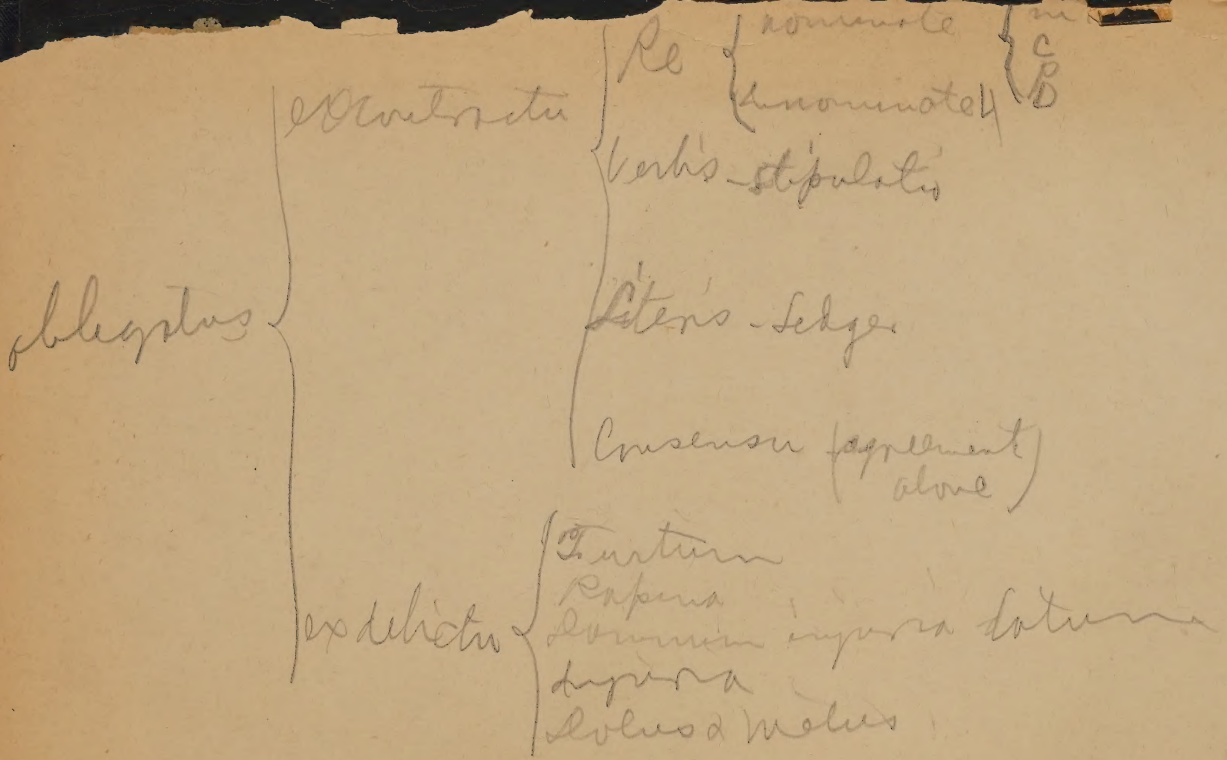
Prestwich. *Geology, Chemical, Physical, and Stratigraphical.* By Joseph Prestwich, M.A., F.R.S. In two Volumes.

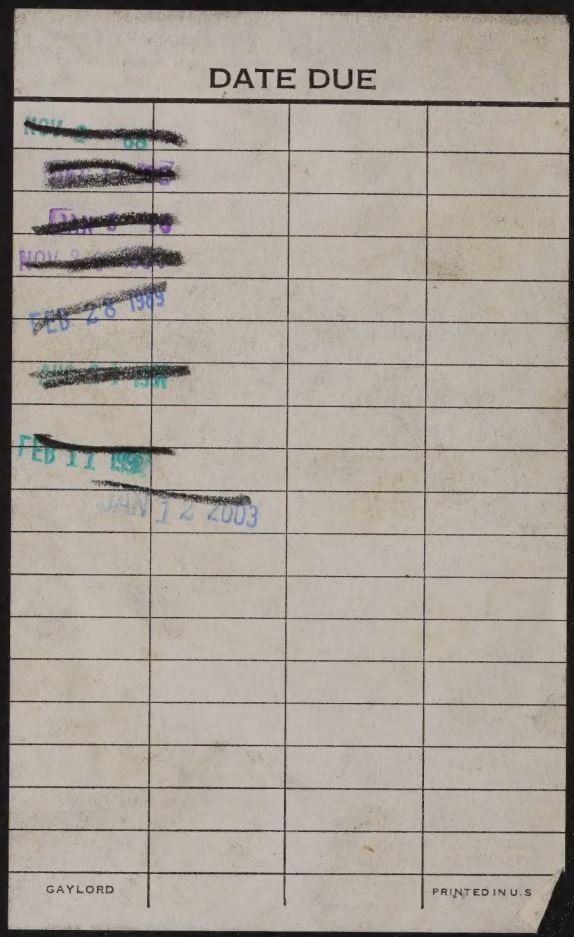
Vol. I. Chemical and Physical. Royal 8vo. 1*l.* 5*s.*
Vol. II. Stratigraphical and Physical. With a new Geological Map of Europe. Royal 8vo. 1*l.* 16*s.*

Price. *A Treatise on the Measurement of Electrical Resistance.* By W. A. Price, M.A., A.M.I.C.E. 8vo. 14*s.*

Smith. *Collected Mathematical Papers of the late Henry J. S. Smith, M.A., F.R.S.* Edited by J. W. L. Glaisher, Sc.D., F.R.S. 2 vols. 4to 3*l.* 3*s.*

Oxford
AT THE CLARENDON PRESS
LONDON: HENRY FROWDE
OXFORD UNIVERSITY PRESS WAREHOUSE, AMEN CORNER, E.C.


obligatus
ex contractu
re
nominate
innominate
C
P
D
verbis - stipulatio
literis - scriptura
consensu (agreement alone)
ex delictu
furtum
rapina
damnum injuria datum
injuria
dolus malus


DATE DUE
FEB 28 1989
JAN 12 2003
GAYLORD
PRINTED IN U.S

DG88 .S68
The Institutes of Roman law.
Princeton Theological Seminary-Speer Library
1 1012 00000 7965